

No. 17595

United States
Court of Appeals
for the Ninth Circuit

ALSCO STORM WINDOWS, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ALSCO NORTHWEST, INC.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeals from the United States District Court for the
Eastern District of Washington,
Northern Division.



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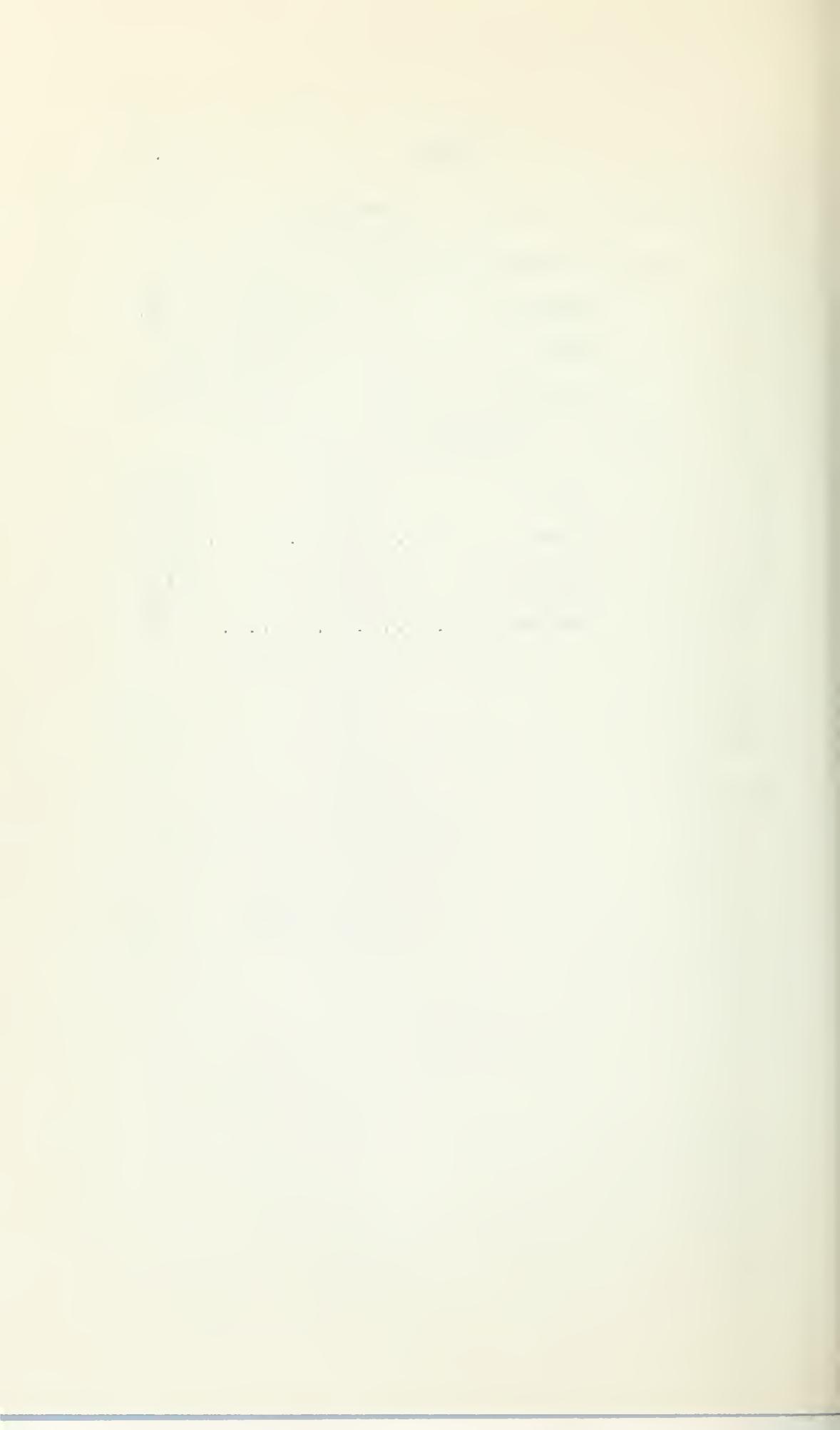
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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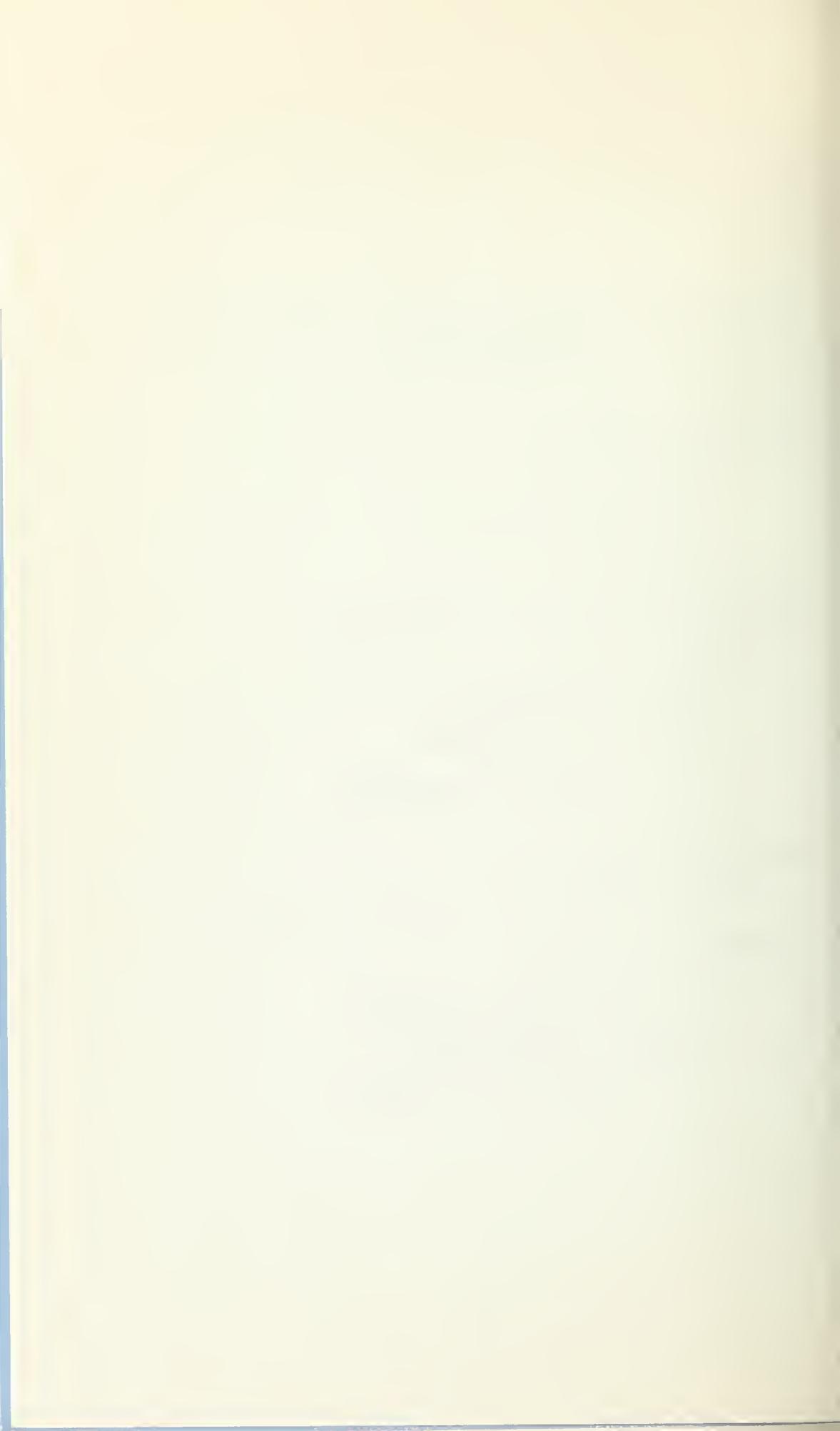


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In the United States District Court for the Eastern
District of Washington, Northern Division

Civil Action No. 1882

ALSCO STORM WINDOWS, INC., for Its Own
Account, and as Transferee of the Assets of
Vent-Air Awnings, Inc., North 328 Fancher
Way, Spokane 62, Washington,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF EMPLOY-
MENT TAXES ERRONEOUSLY PAID
AND COLLECTED

1. This Court has jurisdiction in this action under the provisions of Section 1346(a)(1), Title 28, United States Code.

2. The plaintiff is a corporation doing business in the State of Washington. The defendant is the United States of America. Plaintiff, by this action, seeks to recover federal employment taxes (federal insurance contributions and federal unemployment taxes) erroneously paid to and collected by the defendant.

3. The plaintiff filed its Employer's Quarterly Federal Tax Return (Treasury Department Form 941) with the Director of Internal Revenue at Se-

attle, Washington, and erroneously paid federal insurance contributions taxes on certain persons listed thereon.

4. The plaintiff filed its Annual Return of Excise Taxes on Employers of Four or More Individuals under the Federal Unemployment Tax Act (Treasury Department Form 940) with the Director of Internal Revenue at Seattle, Washington, and erroneously paid federal unemployment compensation taxes to the defendant on the aforesaid persons.

5. The persons upon whom the said taxes were erroneously paid were not employees within the meaning and coverage of Sections 3121(d) and 3306(i), Title 26, United States Code, in that, no employer-employee relationship existed between such persons and the plaintiff within the meaning of the aforesaid sections.

6. For many years, and particularly during 1955 through 1958, the period of this claim, the plaintiff in pursuing its home improvement business would obtain work orders from home owners and other individual property owners for the purpose of affecting certain structural improvements on their premises. The plaintiff corporation then contracted with various skilled mechanics or installers to perform the necessary structural improvement work. The plaintiff contracted with such installers and mechanics under circumstances and conditions where the relationship of employer and employee, as defined under the usual common law rules appli-

cable, did not in fact exist. The relation between the corporation and the mechanics or installers was that of principal and independent contractor.

7. The plaintiff having been informed that it was erroneously paying the aforesaid employment taxes on the earnings of the mechanics and installers, on April 8, 1958, April 28, 1958, and April 13, 1959, filed claims for refund of federal insurance contributions and federal unemployment taxes so erroneously paid. The claims were timely filed with the Director of Internal Revenue at Seattle, Washington, on Treasury Department Forms 843, in accordance with the provisions of Sections 6511(a) and 6513(c)(1), Title 26, United States Code. The reasons for allowing the claims were set out in detail, the substance being that the employment taxes were erroneously paid to the defendant on the mechanics' and installers' earnings though they were not, in fact, employees within the meaning of the provisions of Sections 3121(d) and 3306(i), Title 26, United States Code.

8. The Commissioner of Internal Revenue, through his duly authorized delegate, disallowed the claims for refund by letters, dated July 29, 1959, and in addition, plaintiff executed Treasury Department Forms 2297, Waiver of Registered Mail Notification of Disallowance, following the Commissioner's letters of disallowance. This action is timely filed in accordance with the provisions of Sections 6532(a) and 7422(a), Title 26, United States Code.

In any event, more than six months have expired since the initial filing of the aforesaid claims as provided in Section 6532(a), Title 26, United States Code.

9. The plaintiff claims a refund of federal insurance contributions taxes erroneously paid for the period January 1, 1955, to December 31, 1958, in the amount of \$986.53, or such greater amount as may be allowed by law.

10. The plaintiff claims a refund of federal unemployment taxes for the years 1955, 1956 and 1958 in the respective amounts of \$36.23, \$37.94 and \$16.59, making a total of \$90.76, or such greater amount as may be allowed by law.

Wherefore, the plaintiff prays that judgment be granted in the total amount of \$1,077.29, together with interest and statutory costs and such additional amounts as may be allowed by law.

/s/ WILLARD J. ROE,
Attorney for Plaintiff.

/s/ JOSEPH J. LYMAN,
Of Counsel.

[Endorsed]: Filed November 10, 1959.

In the United States District Court for the Eastern
District of Washington, Northern Division

Civil Action No. 1883

ALSCO NORTHWEST, INC., a Corporation,
North 328 Fancher Way, Spokane 62, Wash-
ington,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR REFUND OF EMPLOY-
MENT TAXES ERRONEOUSLY PAID
AND COLLECTED

1. This Court has jurisdiction in this action under the provisions of Section 1346(a)(1), Title 28, United States Code.

2. The plaintiff is a corporation doing business in the State of Washington. The defendant is the United States of America. Plaintiff, by this action, seeks to recover federal employment taxes (federal insurance contribution taxes and federal unemployment taxes) erroneously paid to and collected by the defendant.

3. The plaintiff filed its Employer's Quarterly Federal Tax Return (Treasury Department Form 941) with the Director of Internal Revenue at Seattle, Washington, and erroneously paid federal

insurance contributions taxes on certain persons listed thereon.

4. The plaintiff filed its Annual Return of Excise Taxes on Employers of Four or More Individuals under the Federal Unemployment Tax Act (Treasury Department Form 940) with the Director of Internal Revenue at Seattle, Washington, and erroneously paid federal unemployment compensation taxes to the defendant on the aforesaid persons.

5. The persons upon whom the said taxes were erroneously paid were not employees within the meaning and coverage of Sections 3121(d) and 3306(i), Title 26, United States Code, in that, no employer-employee relationship existed between such persons and the plaintiff within the meaning of the aforesaid sections.

6. For many years, and particularly during 1954 through 1958, the period of this claim, the plaintiff in pursuing its home improvement business would obtain work orders from home owners and other individual property owners for the purpose of affecting certain structural improvements on their premises. The plaintiff corporation then contracted with various skilled mechanics or installers to perform the necessary structural improvement work. The plaintiff contracted with such installers and mechanics under circumstances and conditions where a relationship of employer and employee, as defined under the usual common law rules appli-

cable, did in fact not exist. The relation between the corporation and the mechanics or installers was that of principal and independent contractor.

7. The plaintiff having been informed that it was erroneously paying the aforesaid employment taxes on the earnings of the mechanics and installers, on October 23, 1957, December 3, 1957 and April 14, 1959, filed claims for refund of federal insurance contributions and federal unemployment taxes so erroneously paid. The claims were timely filed with the Director of Internal Revenue at Seattle, Washington, on Treasury Department Forms 843, in accordance with the provisions of Sections 6511(a) and 6513(c)(1), Title 26, United States Code. The reasons for allowing the claims were set out in detail, the substance being that the employment taxes were erroneously paid to the defendant on the mechanics' and installers' earnings though they were not, in fact, employees within the meaning of the provisions of Sections 3121(d) and 3306(i), Title 26, United States Code.

8. The Commissioner of Internal Revenue, through his duly authorized delegate, disallowed the claims for refund by letters, dated July 29, 1959, and in addition, plaintiff executed Treasury Department Forms 2297, Waiver of Registered Mail Notification of Disallowance, following the Commissioner's letters of disallowance. This action is timely filed in accordance with the provisions of Sections 6532(a) and 7422(a), Title 26, United States Code. In any event, more than six months have expired since the

initial filing of the aforesaid claims as provided in Section 6532(a), Title 26, United States Code.

9. The plaintiff claims a refund of federal insurance contributions taxes erroneously paid for the period ending September 30, 1954, through March 31, 1958 in the amount of \$3,053.37, or such greater amount as may be allowed by law.

10. The plaintiff claims a refund of federal unemployment taxes for the calendar years 1955, 1956 and 1957 in the respective amounts of \$100.13, \$138.17 and \$89.92, making a total of \$328.22, or such greater amount as may be allowed by law.

Wherefore, the plaintiff prays that judgment be granted in the total amount of \$3,381.59, together with interest and statutory costs and such additional amounts as may be allowed by law.

/s/ WILLARD J. ROE,
Attorney for Plaintiff.

/s/ JOSEPH J. LYMAN,
Of Counsel.

[Endorsed]: Filed November 10, 1959.

[Title of District Court and Cause.]

Civil No. 1882

ANSWER

For an answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph 1 of the plaintiff's complaint.

II.

Defendant denies each and every allegation contained in paragraph 2 of plaintiff's complaint.

III.

Defendant denies each and every allegation contained in paragraph 3 of plaintiff's complaint.

IV.

Defendant denies each and every allegation contained in paragraph 4 of plaintiff's complaint.

V.

Defendant denies each and every allegation contained in paragraph 5 of plaintiff's complaint.

VI.

Answering paragraph 6 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations set forth in said paragraph 6 and therefore denies each and every allegation contained therein.

VII.

Defendant denies each and every allegation contained in paragraph 7 of plaintiff's complaint, except that defendant admits that a claim for refund was filed.

VIII.

Answering paragraph 8 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations of said paragraph 8 and therefore denies each and every allegation contained therein.

IX.

Defendant denies each and every allegation contained in paragraph 9 of plaintiff's complaint and specifically denies that plaintiff is entitled to a refund in the sum of \$986.53 or any other sum whatsoever.

X.

Answering paragraph 10 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations of said paragraph 10 and therefore denies each and every allegation contained therein and specifically denies that plaintiff is entitled to a refund in the sum of \$191.42 or any other sum whatsoever.

Wherefore Defendant Prays that judgment in its favor be entered herein, together with the costs allowable by law, and that plaintiff's complaint be dismissed with prejudice.

Dated this 7th day of January, 1960.

/s/ DALE M. GREEN,
United States Attorney.

Certificate of service by mail attached.

[Endorsed]: Filed January 7, 1960.

[Title of District Court and Cause.]

Civil No. 1883

ANSWER

For an answer to plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph 1 of the plaintiff's complaint.

II.

Defendant denies each and every allegation contained in paragraph 2 of plaintiff's complaint.

III.

Defendant denies each and every allegation contained in paragraph 3 of plaintiff's complaint.

IV.

Defendant denies each and every allegation contained in paragraph 4 of plaintiff's complaint.

V.

Defendant denies each and every allegation contained in paragraph 5 of plaintiff's complaint.

VI.

Answering paragraph 6 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations set forth in said paragraph 6 and therefore denies each and every allegation contained therein.

VII.

Defendant denies each and every allegation contained in paragraph 7 of plaintiff's complaint, except that defendant admits that a claim for refund was filed.

VIII.

Answering paragraph 8 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations of said paragraph 8 and therefore denies each and every allegation contained therein.

IX.

Defendant denies each and every allegation contained in paragraph 9 of plaintiff's complaint and specifically denies that the plaintiff is entitled to a refund in the sum of \$3,053.37 or any other sum whatsoever.

X.

Answering paragraph 10 of plaintiff's complaint, defendant does not have sufficient information to form a belief as to the truth of the allegations of said paragraph 10 and therefore denies each and every allegation contained therein and specifically denies that the plaintiff is entitled to a refund in the sum of \$328.22 or any other sum whatsoever.

Wherefore Defendant Prays that judgment in its favor be entered herein, together with the costs allowable by law, and that plaintiff's complaint be dismissed with prejudice.

Dated this 7th day of January, 1960.

/s/ DALE M. GREEN,
United States Attorney.

Certificate of service by mail attached.

[Endorsed]: Filed January 7, 1960.

[Title of District Court and Cause.]

Civil Action Nos. 1882 and 1883

PRE-TRIAL ORDER

A pre-trial conference was held in the above-entitled causes on May 19, 1960, at Spokane, Washington. Judge William J. Lindberg presided. The plaintiffs were represented by Willard J. Roe; and the defendant by Robert L. Fraser, Charles Magnusson, their attorneys of record. As a result, this pre-trial order has been formulated and settled as follows:

Nature of Proceedings
Admitted Facts

The following facts have been agreed upon by the parties and require no proof:

1. The plaintiffs are corporations doing business in the State of Washington.
2. The plaintiffs filed Employer's Quarterly Federal Tax Returns (Treasury Department Form 941) with the Director of Internal Revenue at Se-

attle, Washington, for the period 3/31/54 through 12/31/58 and paid FICA taxes stated thereon.

3. The plaintiff Alesco Storm Windows, Inc. filed its Annual Returns of Excise Taxes on Employees of Four or More Individuals under the Federal Unemployment Tax Act (Treasury Department Form 940) with the Director of Internal Revenue at Seattle, Washington, for the calendar years 1955, 1956 and 1958 and paid FUTA taxes stated thereon. The plaintiff Alesco Northwest, Inc., filed its returns (Treasury Department Forms 940) with the District Director of Internal Revenue at Seattle, Washington, for the calendar years 1955, 1956 and 1957 and paid the FUTA taxes stated thereon.

4. The plaintiffs filed timely claims for refund of the plaintiffs' portion of the federal insurance contributions (FICA) taxes only and the federal unemployment (FUTA) taxes paid to the defendant on the earnings of certain "installers" or "applicators" on the grounds, in substance, that these persons were not, in fact, employees within the meaning of the provisions of Section 3121(d) and 3306(i), Title 26, United States Code.

5. Plaintiffs' claims for refund filed as set forth herein, were disallowed by the Commissioner of Internal Revenue under date of July 29, 1959, and these instant suits were timely filed.

Plaintiffs' Contentions

1. That plaintiffs were not required to assume liability for the payment of federal insurance con-

tributions (FICA) and federal unemployment (FUTA) taxes and that any payments made by the plaintiffs were erroneous on the ground that the "installers" or "applicators" were not employees but were independent contractors.

2. The working arrangement between the plaintiffs and the "installers" or "applicators" was oral, there being no written contract setting out the duties and responsibilities of the respective parties. The working arrangements as actually carried out will disclose that the plaintiffs did not exercise that degree of direction and control over the manner and method in which the "applicators'" or "installers'" services were performed to permit a finding that the "installer" or "applicators" were employees under the common-law tests.

Defendant's Contentions

1. The payments of federal insurance contributions (FICA) and federal unemployment (FUTA) taxes made by plaintiffs were correct, since the "installers" or "applicators" were employees as defined under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, Sections 3121(d) and 3306(i), Internal Revenue Code of 1954.

2. The working arrangement between the plaintiffs and the "installers" or "applicators" was oral, there being no written contract setting out the duties and responsibilities of the respective parties. Testimony as to the working arrangements as actually

carried out, will disclose that the plaintiffs did exercise that degree of direction and control over the manner and method in which the "applicators" and "installers" services were performed to permit a finding that the "installers" or "applicators" were employees under the common-law tests.

Issue of Fact

1. Whether the "installers" or "applicators" listed on Forms 941(c), attached to the claims for refund, were employees of plaintiffs, or independent contractors.

Issue of Law

1. Whether the Commissioner was correct in determining that these "installers" or "applicators" were employees of plaintiffs, and therefore plaintiffs were liable for the payment of federal insurance contributions (FICA) and federal unemployment (FUTA) taxes.

Exhibits

The following exhibits may be received in evidence, if otherwise admissible, without further identification. It being stipulated that each is what it purports to be:

1. Plaintiffs' original tax returns, Forms 940 and 941;
2. Plaintiffs' claim for refund, Forms 843;
3. Forms 941-c, listing the names of the persons designated as "installers" or "applicators." (Attached to Forms 843)

Stipulation

It is stipulated and agreed between counsel for the respective parties hereto that the plaintiffs not be required to prove the amount of the refund due. In the event the Court enters a finding that the "installers" or "applicators" are independent contractors, then in that event the parties will compute the amount of refund due. Should the court enter a finding that the "installers" or "applicators" are employees then no computation would be required.

It is stipulated and agreed between counsel by the respective parties hereto that neither the plaintiff nor the defendant will call more than 2 installers each to testify as to the working arrangement that existed between them and the plaintiffs. Two or less installers are to be selected by the plaintiff and two or less installers are to be selected by the defendant. It is agreed that their testimony will represent the working arrangement that existed as to all installers.

It Is Hereby Ordered that the foregoing constitutes the pre-trial order in the above-entitled causes and that upon the filing hereof of the pleadings pass out of the case and are superseded by this order, which shall not be amended except by consent of the parties, or by order of the Court to prevent manifest injustice.

Dated December 16, 1960.

/s/ CHARLES L. POWELL,
United States District Judge.

The foregoing form of pre-trial order is hereby approved:

/s/ WILLARD J. ROE,
Attorney for Plaintiff.

/s/ ROBERT F. EWING,
Attorney for Defendant.

[Endorsed]: Filed December 16, 1960.

[Title of District Court and Cause.]

Civil Nos. 1882 and 1883

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

This matter having come on regularly for trial before the above-entitled court on the 30th day of March, 1961, plaintiffs being represented by Joseph J. Lyman and Willard J. Roe, its attorneys of record, and defendant being represented by one of its attorneys of record, Robert F. Ewing, Assistant United States Attorney for the Eastern District of Washington, the Court having heard testimony and arguments of counsel and having orally announced its decision, and being fully advised in the premises, makes the following

Findings of Fact

I.

The plaintiffs are corporations doing business in the State of Washington, and are primarily engaged

in the business of contracting for the sale, application and installation of aluminum storm windows and siding.

II.

The plaintiffs filed Employer's Quarterly Federal Tax Returns (Treasury Department Form 941) with the Director of Internal Revenue at Seattle, Washington, for the period 3/31/54 through 12/31/58 and paid FICA taxes stated thereon.

III.

The plaintiff Alsco Storm Windows, Inc., filed its Annual Returns of Excise Taxes on Employees of Four or more individuals under the Federal Unemployment Tax Act (Treasury Department Form 940) with the Director of Internal Revenue at Seattle, Washington, for the calendar years 1955, 1956 and 1958 and paid FUTA taxes stated thereon. The plaintiff Alsco Northwest, Inc., filed its returns (Treasury Department Form 940) with the District Director of Internal Revenue at Seattle, Washington, for the calendar years 1955, 1956 and 1957 and paid the FUTA taxes stated thereon.

IV.

The plaintiffs filed timely claims for refund of the plaintiffs' portion of the Federal Insurance Contributions (FICA) taxes only and the Federal Unemployment (FUTA) taxes paid to the defendant on the earnings of certain installers on the grounds, in substance, that these persons were not, in fact,

employees within the meaning of the provisions of Section 3121(d) and 3306(i), Title 26, United States Code.

V.

The plaintiffs' claims for refund filed as set forth herein, were disallowed by the Commissioner of Internal Revenue under date of July 29, 1959, and these instant suits were timely filed and consolidated for trial.

VI.

Working arrangements between the plaintiffs and the installers were oral, there being no written contract setting out the duties and responsibilities of the respective parties.

VII.

The plaintiffs had the names of several qualified installers who would be contacted when there were jobs to be performed. In some instances installers would come to plaintiffs' office seeking work and at other times the plaintiffs would advertise through various media for experienced installers. Plaintiffs had some installers who worked regularly and for no one else in the period in question, while other installers only worked periodically.

VIII.

When the plaintiffs were ready to commence work on a particular contract, the installer, if he agreed to do the job, was handed a work sheet which contained the name and address of the property owner

where the work was to be performed, a general description of the work, together with an approximation of the materials to be applied, or the number of storm windows to be installed.

IX.

Generally, the relationship between the plaintiffs and the installers was such that the installers were free to accept or reject any proffered job. On at least one occasion, however, two of the plaintiffs' regular installers were called into the office of the production manager of the plaintiffs for disciplinary reasons because they were seen at a competing firm. Loyalty to the plaintiffs' firm was discussed on this occasion. The two installers involved were not doing a job for the plaintiffs at the time and were driving their own trucks which contained no materials owned by the plaintiffs.

X.

On some occasions installers who applied for work when no work was available were referred to competing firms, however, regular installers of the plaintiffs, who had worked for plaintiffs over a period of years, were not referred to a competitor during those times when no work was available.

XI.

Contract materials such as storm windows were furnished by the plaintiffs, but tools and installation equipment, such as ladders, were generally fur-

nished by the installer himself, as was the transportation to and from the jobs. The installers paid their own transportation expenses and also their own expense for meals and lodging for jobs performed out of the local area.

XII.

The installers worked either alone or with an associate installer. On many occasions numerous work orders were picked up upon a single call to the office. Plaintiffs occasionally attached priority to these work orders and installers were instructed as to which jobs were to be done first, second, etc. Installers were free to, and did on occasion, employ helpers without the approval of the plaintiffs. The helpers were paid either by the installer or by the plaintiffs, at the specific direction of the installer, from the amount of compensation due from the plaintiffs to the installer on the specific job on which the helpers were employed. The helpers were under the control of the installers in the performance of their work and with respect to hiring, and discharge.

XIII.

Occasionally two installers would commence a job together and before it was finished one installer would be moved to another location and job at the request of the plaintiffs. The installer who was moved did not always return to the original job that he had commenced. Single installers were occasionally moved from one job to another at the request or direction of plaintiffs because of deadlines that

had to be met, illness and weather. The installer was not always returned to the job he had originally started.

XIV.

As a part of plaintiffs' written policy to have the installers present a neat appearance while performing jobs for the plaintiffs, white coverall uniforms bearing the advertisement of Alesco on the back were furnished to installers who were requested to wear the same. The weekly charge for rental and cleaning of the coveralls was deducted from the installers pay.

XV.

The plaintiffs generally paid the prevailing rate to the installers on a per unit basis for jobs included within a work order. Any extra labor performed by installers was paid on an hourly basis. Upon completion of a job that was to be paid in cash, the installer would get the money in some instances from the home owner and turn it over to plaintiffs. On F.H.A. jobs, the installer was instructed to get a completion certificate signed by the home owner. Payments for all jobs to the installers were made by company checks.

XVI.

The installers paid all their expenses incident to the performance of the work without accounting to or reimbursement from the plaintiffs.

XVII.

The installers could not substitute materials and generally had no authority to change the contract.

However, in minor matters which would not involve any change in the increasing or decreasing of the money due on a particular job, the installer might consult with the customer and could proceed without prior consultation with the plaintiffs.

XVIII.

The installers did not hold themselves out to the public in any way, shape or form as being installers in business for themselves. None of the installers possessed contractors cards.

XIX.

Plaintiffs would advertise their products and business on the various jobs by placing placards at the job sites. They also advertised on the coveralls worn by the installers as heretofore mentioned. Plaintiffs did attempt to encourage the installers to advertise plaintiffs' business on the trucks owned by the individual installers, but such advertisement was rejected by the respective installers. Interested people passing by a job site were referred to the plaintiffs or a salesman working for the plaintiffs.

XX.

Plaintiffs did not hire supervisors as such to observe, instruct or direct the installers as the work progressed. Salesmen were supposed to look over jobs and did look over jobs. They occasionally offered suggestions or gave directions which were adhered to by the installers. The manager of the

plaintiffs inspected jobs and gave both suggestions and directions, and, as he testified, he expected them to be followed. The manager had the power to instruct the installers as to the way a job should be done. The plaintiffs, through their manager and production manager, had the power to terminate a job with an installer during the course of a job as well as after a job was finished. If not satisfied with an installer's work, the plaintiffs removed him from a job in progress or did not offer him another work sheet upon completion of the job.

XXI.

Plaintiffs on occasion issued written bulletins to the installers which pointed out the way various aspects of a job was to be done. These bulletins also listed various things that the installers were not to do before, during and after performance of any particular job.

XXII.

The installers were not members of any labor union and plaintiffs' dealings with them were on an individual basis.

XXIII.

The installers were not required to start or finish work at any particular time but regulated their own work day. They were not promised work for any set period of time.

XXIV.

Upon completion of a job being financed by F.H.A., the installer was to get a completion slip

signed by the customer which certified that the customer was satisfied with the job as done. If the customer did not sign the slip, as happened on occasion, the installer would find out the complaint and report it to the plaintiffs. If additional work was needed, generally the same installer would go back and complete the job. If it was due to the fault of the installer, the work would be done at the installer's own expense. The installer who performed the original job did not always return to complete the job in accordance with the complaint, although he was available, except for being assigned to another new job. At the completion of the job the installer performed his own clean up work without additional compensation.

From the foregoing Findings of Fact the Court makes the following

Conclusions of Law

I.

The Court has jurisdiction of the subject matter herein.

II.

The plaintiffs did exercise that degree of direction and control over the manner and method in which the installers performed their services to constitute the installers employees under the usual common-law tests.

III.

The payments of Federal Insurance Contributions (FICA) and Federal Unemployment (FUTA)

taxes made by plaintiffs were correct, since the installers were employees as defined under the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, Sections 3121(d) and 3306(i), Internal Revenue Code of 1954.

IV.

The plaintiffs' complaints should be dismissed with prejudice.

V.

The defendant should have judgment for its costs herein incurred.

Dated May 18, 1961.

/s/ CHARLES L. POWELL,
United States District Judge.

Presented by:

/s/ ROBERT F. EWING,
Assistant United States
Attorney.

[Endorsed]: Filed May 19, 1961.

United States District Court for the Eastern
District of Washington, Northern Division

Civil No. 1882

**ALSCO STORM WINDOWS, INC., for Its Own
Account, and as Transferee of the Assets of
Vent-Air Awnings, Inc.,**

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1883

ALSCO NORTHWEST, INC., a Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on regularly for trial before the above-entitled Court on the 30th day of March, 1961, and the Court having heard testimony and arguments of counsel and having orally announced its decision and entered its finding of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that:

1. The plaintiffs' complaints be and are hereby dismissed with prejudice.
2. The defendant have judgment for its costs herein incurred.

Dated May 18, 1961.

/s/ CHARLES L. POWELL,
United States District Judge.

Presented by:

/s/ ROBERT F. EWING,
Assistant United States
Attorney.

Approved as to form:

/s/ JOSEPH J. LYMAN,

/s/ WILLARD ROE,
Attorneys for Plaintiffs.

[Endorsed]: Filed and entered May 19, 1961.

[Title of District Court and Cause.]

Civil No. 1882

NOTICE OF APPEAL

Notice is hereby given that Alsco Storm Windows, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 19, 1961.

Dated this 17th day of July, 1961.

HAMBLEN, GILBERT &
BROOKE,

By /s/ FRED W. GILBERT,
and

/s/ JOSEPH J. LYMAN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 17, 1961.

[Title of District Court and Cause.]

Civil No. 1883

NOTICE OF APPEAL

Notice is hereby given that Alesco Northwest, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 19, 1961.

Dated this 17th day of July, 1961.

HAMBLEN, GILBERT &
BROOKE,

By /s/ FRED W. GILBERT,
and

/s/ JOSEPH J. LYMAN,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed July 17, 1961.

[Title of District Court and Cause.]

Civil Action No. 1882

Civil Action No. 1883

STIPULATION

It is stipulated by and between counsel for the respective parties that the above-captioned cases be, and they are, hereby consolidated for purposes of trial and appeal and such other procedures which may be warranted.

FRANK R. FREEMAN,
United States Attorney;

By /s/ CARROLL D. GRAY,
Ass't. United States Attorney,
Attorney for Defendant.

/s/ FRED W. GILBERT,
/s/ JOSEPH J. LYMAN,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 28, 1961.

[Title of District Court and Cause.]

Civil No. 1882

Civil No. 1883

STATEMENT OF POINTS

Appellants set forth the following points on which they intend to rely in this appeal:

1. The Court erred in dismissing the Complaints;
2. The Court erred in holding that appellants had not sustained the burden of proof that the applicators were not employees within the meaning of Sections 3121(d) and 3306(i), Internal Revenue Code.
3. The Court erred in holding that the appellee sustained the allegations set out in the pre-trial order that the applicators were employees under the common-law tests.
4. The Findings of Fact and Conclusions of Law and Judgment of the District Court are unsupported by and contrary to the evidence of the record.

Respectfully submitted,

/s/ JOSEPH J. LYMAN,

HAMBLEN GILBERT &
BROOKE,

By /s/ FRED W. GILBERT,
Attorneys for Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed August 10, 1961.

In the District Court of the United States for
the Eastern District of Washington, Northern
Division

Civil No. 1882

ALSCO STORM WINDOWS, INC., for Its Own
Account, and as Transferee of the Assets of
Vent-Air Awnings, Inc.,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Civil No. 1883

ALSCO NORTHWEST, INC., a Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Before: Honorable Charles L. Powell, Judge, with-
out a jury

TRANSCRIPT OF PROCEEDINGS

March 29, 1961

Appearances:

For the Plaintiff:

JOSEPH J. LYMAN,

Attorney at Law.

WILLARD J. ROE,

Attorney at Law.

For the Defendant:

DALE M. GREEN,

United States District Attorney;

ROBERT F. EWING,

Assistant U. S. District Attorney.

* * *

MILTON L. LEE,

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Clerk of the Court: Please state your full name to the Court?

A. Milton L. Lee.

Direct Examination

By Mr. Lyman:

Q. What is your occupation, Mr. Lee? [6*]

A. I am the manager of Alesco Northwest.

Q. And that, also, includes a relationship similar to Alesco Storm Windows, Inc.?

A. Yes. I have the same position in that corporation.

Q. Now, I want to call your attention to the period 1954 to 1958; what was your relationship to the particular corporations at that time?

A. I was the president and manager of each.

Q. Now, in 1954 to 1958 where did you spend a great deal of your time with respect to your business?

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Testimony of Milton L. Lee.)

A. I spent about two-thirds of that period in Salt Lake City.

Q. Now, you have another corporation in Salt Lake City which has no connection with these two, is that correct, sir?

A. Well, it's the parent corporation, but they are independent of each other, yes.

Q. In other words, the payroll records with which we are concerned of the two plaintiff corporations were separate and apart from the Utah corporation? A. Yes.

Q. Very well. Now, when did you come to this area and actively participate in the businesses of these two plaintiff corporations?

A. The early part of 1958. [7]

Q. But you were aware, were you not, of the business activity of these corporations even though you were in Utah?

A. Oh, yes, I made frequent trips through the area.

Q. All right, sir. Now what, essentially, is the business of these two plaintiff corporations during that time?

A. During that time we were in the business of manufacturing and selling storm windows, storm doors, and siding.

Q. And these are aluminum products, are they not? A. They are all aluminum products.

Q. Now, how would you go about getting business for your company to make its profit?

A. Our business was secured through salesmen, mainly; we had dealers, also.

(Testimony of Milton L. Lee.)

Q. And what would these salesmen do?

A. The salesmen would contact the home owners and sell them our products on an installed basis.

Q. And then would you obtain a contract between the customer and your company?

A. Yes.

Q. All right. Now, these salesmen, what was their status insofar as Internal Revenue is concerned and these particular taxes are concerned?

A. They have been ruled to be independent agents not subject to withholding tax and social security tax. [8]

The Court: Does that answer your question?

Mr. Lyman: Yes, your Honor.

The Court: Well, that is hearsay.

Q. (By Mr. Lyman): No, I was going to ask him if he had any personal knowledge what the status was insofar as Internal Revenue is concerned in these taxes.

The Court: All right.

Mr. Lyman: I don't even know it is material, your Honor, but I just want to show you the status of these particular salesmen who deal later, with these applicators.

The Court: I don't understand from the pleadings and these interrogatories and pre-trial order that the salesmen deal directly with the applicators.

Mr. Lyman: Well, perhaps it is not material, your Honor, but they do, nevertheless; perhaps it is not material here.

Q. I will show you Plaintiffs' Exhibit 1 for iden-

(Testimony of Milton L. Lee.)

tification and ask you is this a typical contract that a salesman would enter into on behalf of your company with a customer (hands paper to witness) ?

A. It's a copy of one.

Q. Now, I will ask you what is Plaintiffs' No. 2 for identification (hands paper to witness) ?

A. This is a copy of a work order which is made up from this contract. [9]

Q. The contract being Plaintiffs' 1 for identification, is that correct? A. Yes.

Q. All right, have you seen this, Mr. Ewing? Now, Plaintiffs' 3 for identification, is that also a contract similar to Plaintiffs' 1 for identification (hands paper to witness) ?

A. Yes, that is a copy of a contract.

Q. And Plaintiffs' 4 for identification is a work order similar to Plaintiffs' 2 for identification (hands paper to witness) ?

A. Yes, that is a copy of the work order made up from No. 3.

Q. Now, in other words, a contract and a work order are a set of documents relative to a job that is going to be done, is that correct, sir?

A. That is correct.

Q. And Plaintiffs' 5 for identification, is that a contract similar to the others I have shown you (hands paper to witness) ? A. Yes.

Q. And Plaintiffs' 6 is a work order pursuant to the contract of Plaintiffs' Exhibit 5 for identification? A. Yes.

Q. All right, sir, and Plaintiffs' 7 for identifica-

(Testimony of Milton L. Lee.)

tion, [10] is that a contract between a customer and your company (hands paper to witness) ?

A. Yes, it is.

Q. And Plaintiffs' 8 for identification, is that a work order pursuant to the contract which is Plaintiff's 7 (hands paper to witness) ?

A. Yes, it is.

(Counsel shows documents to defendant's counsel.)

Mr. Lyman: If the Court please, the plaintiff offers Exhibits 1 through 8 for identification in evidence. There is no objection on the part of the defendant?

Mr. Ewing: There is no objection, your Honor.

The Court: All right, they will be admitted as Plaintiffs' Exhibits 1 through 8, inclusive.

(Whereupon, said documents were admitted in evidence as Plaintiffs' Exhibits Nos. 1 through 8, inclusive.)

Q. (By Mr. Lyman): Now, Mr. Lee, after the contract comes into the Company, who draws up the work order?

A. Specifically, no particular person. It may be done by the salesman himself or by somebody in the office.

Q. But it is done in your office?

A. Yes, it is.

Q. Now, other than these salesmen, what other categories [11] of persons do you have?

A. Well, we have two other categories, three, ac-

(Testimony of Milton L. Lee.)

tually. We have our office personnel, our shop personnel, and our subcontract personnel, the applicators and installers.

Q. All right. Now, the office personnel, there is no question but they are employees under this proceeding? A. No question with me.

Q. Now, the shop personnel, how do they work?

A. They are regular full time employees, they punch a clock, subject to wages and hours law.

Q. They punch a clock, is that correct?

A. Yes.

Q. You determine their hours? A. Yes.

Q. And you give them a place to work?

A. Yes.

Q. That is in your shop? A. Yes.

Q. And do you have a supervisor in the shop?

A. We have several.

Q. And they supervise the work of these people?

A. Yes.

Q. And are these persons given various jobs to do, according to the will of the supervisor? [12]

A. Yes, they are.

Q. Now, their status is not in issue in this proceeding? A. No.

Q. Now, this other category, installers and applicators you mentioned, whose status is in this proceeding, how do they work with respect to pay?

A. They work by the job on a piece work basis.

Q. And who determines their hours?

A. They determine them themselves.

Q. And who furnishes the equipment and the tools necessary for the performance of this work?

(Testimony of Milton L. Lee.)

A. They furnish their own.

Q. And do these applicators and installers have helpers? A. Some do.

Q. And how do they get these helpers?

A. They hire them.

Q. Well, does the Company have any part in the hiring of these helpers?

A. Not to my knowledge.

Q. Well, do they, as far as you know, Mr. Lee?

A. Well, they don't as far as I know, yes.

Q. And who pays these helpers, who determines their pay?

A. The pay is determined by the applicator or installer who hires them.

Q. And who determines the working conditions of these [13] installers?

A. The person who hires them.

Q. Does the Company in any way interfere with the relationship between your applicators and these helpers, as far as working conditions?

A. They never have, to my knowledge.

Q. Now, these work sheets which were identified, well, you have seen them in evidence, they are given, what is done with those with respect to these installers?

A. Well, those work sheets are turned over to our shop manager, factory manager.

Q. Who is that?

A. Who is Mr. Ralph Williams.

Q. All right.

A. He, in turn, prepares the windows and the

(Testimony of Milton L. Lee.)

doors for the siding necessary to go on the job, and then hands them, that is, the work orders and material, over to an installer or an applicator.

Q. All right, now what does the applicator do with that work sheet and these materials that he has picked up?

A. He takes them on his own equipment, delivers them to the job, puts the job on. When the job is finished, he comes in and gets paid for it.

Q. Now, do you have any written agreement with these applicators, or is it an oral situation? [14]

A. It's oral.

Q. Now, other than the writing on the work orders which you have identified, are there any other instructions given by the Company to these men as to how to do this work?

A. Specifically, how to do each job, do you mean, sir?

Q. Yes. A. No.

Q. Do you have any supervisors to go out into the field and supervise the work of these men?

A. No.

Q. What is the average experience of these applicators during this period?

A. Oh, I would say the average experience must be at least two or three years.

Q. Now, do some of them have more than that?

A. Yes.

Q. Now, is there any kind of guarantee of compensation that these men get?

(Testimony of Milton L. Lee.)

A. No, except if they finish a job properly, they get paid for it.

Q. But I mean on the matter of the fact that they may put in time, does that feature in any way at all? A. No.

Q. In other words, each of these work orders which you have [15] identified is a separate and complete job in itself? A. That is correct.

Q. And the man's compensation is based upon that work order, is that correct?

A. That is accurate.

Q. Now, do you ever have a situation where you may have a window job or a siding job, incidentally, how are the siding applicators paid?

A. The siding applicators are paid the same way.

Q. Per square? A. Per piece and per job.

Q. Per job? Now, do you ever have a situation where, in the course of making an installation, you may have some carpentry work which cannot be measured by the unit?

A. Yes, that often happens.

Q. Now, what happens there, as far as compensation to the men is concerned?

A. Well, he makes an extra charge on his work order, which he turns in and receives payment for it.

Q. Is there any particular basis for it with respect to windows and with respect to siding?

A. Generally it's based on the hours they spend on the extra work.

(Testimony of Milton L. Lee.)

Q. And who determines how many hours there are? A. The man, himself. [16]

Q. And does the Company ever question his added expense? A. We have.

Q. What happens then?

A. Well, it's a matter of dispute and negotiation. As a matter of fact, we question it; we sometimes require a fellow to produce evidence that he did what he said he did and spent the time he said he did on it. That is a rare situation, however.

Q. I see. Well, with respect to the installations which are paid on a piece work basis, percentage wise, if you can, how much is this extra work?

A. In the window and door business it might not exceed two or three per cent.

Q. I see, and what about siding?

A. With the siding business it might be considerably more, say, ten per cent or fifteen per cent, something like that.

Q. Now, on the siding when you find you have extra work to do, what happens then? How does the man go about doing it when it is not contemplated in the original contract?

A. He generally calls the company, and we would renegotiate the contract with the customer or decide to do it as part of the original contract or, in some cases, we have actually given up jobs because we don't feel that we can [17] renegotiate them and don't feel we can make a profit.

Q. Now, has a man to your knowledge ever been

(Testimony of Milton L. Lee.)

taken off a job while it was in progress or discharged from a job while it was in progress?

A. You mean completely removed from the job, permanently?

Q. Yes. A. Yes.

Q. And what would the reason be for such a thing?

A. Unsatisfactory performance of the application.

Q. But other than that, there would be no indiscriminate firing? A. No.

Mr. Ewing: I object, your Honor, I don't understand what he means by "indiscriminate."

Q. (By Mr. Lyman): Well, let me ask you this, then: What would be the basis of severing a relationship with an installer or applicator?

A. There would probably be two main categories of severing relationships. One would be unsatisfactory performance; the other would be a lack of sufficient work to keep a man busy.

Q. All right. Well, now, if you find that a man has performed unsatisfactorily, how do you sever that relationship; do you understand my question?

A. Almost always the relationship between us and an [18] applicator and installer takes place after his job is completed or after we think it's completed.

Mr. Ewing: I don't think that is responsive to the question.

The Court: No, sustained.

Q. (By Mr. Lyman): Well, let me ask you this:

(Testimony of Milton L. Lee.)

How many applicators do you usually have working during the year, what is the highest number you have had? A. At one time?

Q. Yes.

A. In all our branches, probably 30.

Q. And then what would be the least number that you would have?

A. Oh, about eight or ten.

Q. Now, of that eight or ten how many would you call, for want of a better term, regulars?

A. Eight or ten.

Q. And that is through all your branches?

A. Yes.

Mr. Ewing: Your Honor, could I get a clarification of what counsel means by "regulars"?

The Court: I think if he doesn't want to say, you can get it on cross.

Q. (By Mr. Lyman): Well, regulars; well, first, how many branches do you have? [19]

A. At that particular time we were operating four.

Q. Now, for instance, when you got to your slow periods, about how many would you have, of regulars? A. Two or three.

Q. And would they be in the category of, what persons, if you can name them?

A. The ones that come to my mind are George Aronson and Don Lewis.

Q. All right. Now, when I say "regulars," do they work any differently than the people who come and go in your plant?

(Testimony of Milton L. Lee.)

A. No, not any different than the installers.

Q. I mean the installers that come and go through the company, these regulars, are they the persons—how is it that they seem to stay on and other persons seem to leave, can you explain that?

A. Well, we continue to give contracts or work sheets to men who do satisfactory work and are dependable and we have mutual good will with them.

Q. All right. If a situation arises where a man completes a job and even though work is available, you would not give him another work order?

A. Yes.

Q. What are those circumstances?

A. The circumstances would be based upon unsatisfactory [20] performance on the job.

Q. Under those circumstances you would not renew the relationship?

A. We just wouldn't renew the relationship, that is right.

Q. How do you go about getting applicators?

A. Oh, we secure new applicators by telephone, by applications in person, by employment bureaus, by newspaper ads.

Q. Is there anything in your arrangement with the applicators and installers which obligates the Company to give them work, any given number of jobs?

A. No, we don't have any guarantee to any installer or applicator.

Q. Is there anything in your arrangement where

(Testimony of Milton L. Lee.)

the installer has agreed that he would do a certain number of jobs?

A. Not to my knowledge.

Q. Has there ever been a situation where work was unsatisfactory and not performed in a workmanlike manner by any installer or applicator?

A. Yes.

Q. What happens there insofar as completing that work is concerned?

A. We demand that the installer or applicator who does the job go back on his own time and complete it or fix up [21] the deficiency.

Mr. Lyman: Will you indulge me a moment, your Honor?

Q. What is the situation with respect to the men taking off time when you may perhaps have work orders in the shop to be applied?

A. They have always been free to take the time off that they require.

Q. Do you have any specific examples of any particular persons who took such time away from these application jobs?

A. Yes, we specifically have difficulty keeping our jobs going at the time of the year when the hunting and fishing season is opened and the fellows like to go hunting and fishing, and so they go.

Q. What arrangements, if any, are made?

A. Well, usually it's a gentlemen's agreement between the fellows and Ralph Williams. They usually tell him that they are going to go hunting,

(Testimony of Milton L. Lee.)

and going to go at a certain time, and he is aware of the fact, and that is about what it amounts to.

Q. Well, what do you do with the jobs that you have in the shop that have to be applied?

A. Well, oh, we just do the best we can with what we have. We wait, usually, I mean, we get [22] behind.

Q. Did any of these installers that have performed services for you, and applicators as well, ever perform services for other companies, like competitors in this area? A. Yes.

Q. And are these jobs performed between jobs that they perform for you? A. Yes.

Q. Do you have any knowledge whether an installer who is performing a job for you may do some minor repair for a customer and be paid by the customer?

A. I think almost all of them have at one time or another.

Q. Is that a practice, or do you know?

A. Well, the practice, if you are asking me if it is the usual thing or it might happen, in the majority of jobs they put on, I would say no, but I still say I think almost everybody that has applied for us has done it at one time or another.

Mr. Lyman: I believe that is all for this witness, your Honor.

(Testimony of Milton L. Lee.)

Cross-Examination

By Mr. Ewing:

Q. Mr. Lee, you stated that you came to Spokane to work in 1958, is that correct, from Salt Lake?

A. Yes. [23]

Q. And during the period from 1954 to 1958, what was your relationship to Alsco Northwest and Alsco Storm Windows here?

A. I was the president.

Q. And being president, I assume that you were familiar with the work order procedure, even though you were not here? A. I established it.

Q. And could you explain briefly, again, what that work order procedure was, who initiated the work order? Who initiated the work order?

A. Well, the work order was, generally speaking, a copy of our production order, it was made out by somebody in the office or a salesman or a dealer.

Q. Is that the work order was made out by the dealer or salesman or the purchase order?

A. The work order is a copy of the purchase order.

Q. And who made out the work order?

A. The person that made out the purchase order.

Q. The same person made out both orders?

A. It was a copy of the same thing, a carbon copy.

Q. When you had work to be done, how were these installers notified of such?

A. Well, there was no positively established pro-

(Testimony of Milton L. Lee.)

cedure. If we were behind in our application, we would get on the [24] phone and contact new men. If we were up on our application, why, the fellows would be coming in at regular intervals, so it would vary.

Q. As to your regular installers, using that word in the sense in which you used it, your regular installers, they just simply came in and picked up work orders and went out on the job without any notification, I suppose, is that right?

A. Well, if you are asking if we have to notify them between each group of jobs they got, no, that is a distinguishing feature between them being regular and irregular.

Q. Did you keep a file for each installer and keep his work order in that file, or just how did that work?

A. Part of the time, part of this period we did that, part we didn't.

Q. What do you mean by that?

A. Well, it is just a difference in establishing procedures in the office. There is one part of the time in this period we did keep a specific file for each man and keep all of the work orders in it. At another part of this period we didn't do it.

Q. Who handed the work orders out to the installers, did they go right to the file and get their orders, or did somebody give them to them? [25]

A. Generally speaking, they were passed out hand to hand by Mr. Williams or one of his assistants.

(Testimony of Milton L. Lee.)

Q. Was there any written agreement between your company and the installers other than the work order? Was that the only thing in writing as between you and the installers, that is, Alsco and the installers?

A. In the way of an agreement?

Q. Right. A. Not that I know of.

Q. Would the work order be the only thing that would indicate an agreement? Was there anything else? A. In writing?

Q. In writing. A. Yes.

Q. You say there was other things in writing?

A. No, that was the only thing that represented an agreement in writing.

Q. Were pay negotiations entered into at the time an installer picked up his work order?

A. Sometimes.

Q. Who set the prices, unit prices, as to which these installers would be paid?

A. Those prices were generally arrived at from a conference that all the installers and applicators that were interested would attend, and the management and production [26] department, we sat down and negotiated them, so to speak.

Q. As I understand your testimony as to work done in the work order they were paid by the unit price? A. Yes.

Q. As to extra work, it was a different pay system, is that correct?

A. No, not a different pay system, it's a different pay basis.

(Testimony of Milton L. Lee.)

Q. Well, they were not paid by the unit price for extra work, were they?

A. I don't understand you, by the "unit price"?

Q. Well, piecemeal; was it piecemeal. Was the basis of extra work paid on a piecemeal basis?

A. No, I have already stated I think in almost all cases the basis of extra work was the time spent on the extra work.

Q. And what would extra work be and what would be your definition of extra work?

A. Well, to a large extent extra work was not defined by us, it was defined by the installers, because in most cases we never saw it or had any particular interest in seeing it. It was a matter of judgment with them. If a man put up a storm window and he found out that he had to have blind stops, that isn't the usual thing, he [27] considered it extra, so he charged extra.

Q. And, as I understand, he listed the hours it took him to do that extra work and you paid him?

A. Sometimes he listed the hours and sometimes he didn't.

Q. Well, any hours that were listed, you paid him on the basis of what he says in his order?

A. Almost invariably we paid on what was on the work order.

Q. Were these installers free to accept or reject any work order that was offered to them?

A. Yes.

Q. In the event that a work order was offered to

(Testimony of Milton L. Lee.)

an installer and he turned it down, what would happen then, if anything?

A. Well, I don't know what you mean, what would happen?

Q. Well, was he given another work order, or if you offered a work order to one installer and he turned that one down, would he get another job, or just what would happen to it?

A. Well, yes and no, the circumstances would determine that.

Q. By "yes and no," you mean sometimes an installer would be given another job and sometimes he wouldn't?

A. It is still based on having turned one down?

Q. Right.

A. Well, I am not familiar with any situation like that [28] myself. I do know that installers turned down work orders because they had something else to do. They had a job of somebody else's to go on, or wanted to make a trip, or something. Well, as I say, except for unfinished work or bad performance, a fellow would get another job, yes.

Q. Do you know of your own knowledge of any work order which an installer turned down because he wasn't satisfied with the price or the money he was going to get on that job? A. Yes.

Q. And as to that particular type of situation, what would happen to the installer, then?

A. Well, that particular type of situation would generally be referred to me and in every case that I can recall I negotiated with this particular ap-

(Testimony of Milton L. Lee.)

plicator or installer and worked out a satisfactory pay basis, that is my knowledge of it.

Q. Have there been times when an installer has applied for work with you, maybe one of your regular installers, and you haven't had a job for him at that time?

A. Yes, that frequently happens.

Q. Speaking of Alesco, have you referred him to a competitor in those cases?

A. Yes, I have referred a great many men to competitors. [29]

Q. Have there been jobs where more than one applicator was required on that particular job, in other words, two or more applicators worked on different jobs? A. Yes.

Q. If a question came up in the performance of that job, which applicator's word would control as to what should be done?

A. Well, I am not in a position to answer that question.

Q. I think you stated on direct examination that there are times when an installer would hire a helper to help him? A. Yes.

Q. And that installer was hired by the—helper was hired by the installer and discharged by the installer? A. Yes.

Q. Now, did you keep the pay records of that helper at all? A. Yes, we did, in some cases.

Q. You handled the money for the applicator, is that right? A. In some cases.

(Testimony of Milton L. Lee.)

Q. Who furnished the materials that went into any particular job?

A. Are you speaking about any particular job, you mean one of our contracts?

Q. In general, who furnished the materials that went into these jobs? [30]

A. The Company did.

Q. Who delivered them to the job site?

A. The applicator and installer.

Q. Was anything else furnished by your company other than materials?

A. I don't know of anything, I don't quite follow the question.

Q. Did you ever loan out ladders, or anything like that?

A. Yes, we have loaned out tools which an installer wouldn't normally be expected to have.

Q. Did your company have supervisors or other personnel such as salesmen, that would go out on jobs when they were in the process of being completed and observe the job in progress and possibly make some instructions or suggestions to the installer?

A. We had no supervisors, we had no regular system of inspecting jobs, and if a salesman directed an installer, he did it on his own.

Q. Did any of the salesmen go out and look the jobs over? A. Yes, it has been done.

Q. Were they supposed to go out and look the jobs over?

A. Well, I don't know what you mean by "sup-

(Testimony of Milton L. Lee.)

posed to." It's true that the Company would like to have every salesman go out and see a job while it's in the process of application, but, as a practical matter, it's more rare [31] than usual.

Q. Was it the policy of your Company that they were supposed to go out and look at jobs?

A. We encouraged them to do it, that is right.

Q. Did either the plant foreman, Mr. Williams, or you ever go out and look at a job?

A. Together?

Q. Well, not together, but either one of you?

A. Well, I can't speak for Mr. Williams, except that I think he did. As far as I am concerned, I have been out.

Q. And on these jobs that you have gone out to look at, have you ever made any suggestions to the applicators?

A. Specifically, I can't recall any directions I have given an applicator on a job that had to do with his work.

Q. You can't remember any?

A. No, I can remember a couple of instances in which changes in the contract or additions to the contract have been made and which I have told the man that instead of doing half a job that "We are going to do the whole job, or that we are going to add a little siding to the back of his house, or do a gable, or put an awning on," or something like that, which would actually amount to additional work; but as far as offering advice in a situation like that at a job, I don't recall ever having [32] done it.

(Testimony of Milton L. Lee.)

Q. You can't recall ever giving any directions to an applicator on a job?

A. Yes, if he wanted to know how to get to another job, I certainly would tell him.

Q. If what?

A. If he wanted to get from one job to another, I would tell him, sure.

Q. No, have you ever given any directions to an applicator on these jobs that you have gone out to look at, have you ever given them any directions as to that job?

A. Well, I just answered that question, no, not that I recall.

Mr. Ewing: May I have the deposition opened and published?

The Court: Do you want it published?

Q. (By Mr. Ewing): Do you recall when you were in my office on the 21st day of November of last year for me to take your deposition?

A. Yes.

Q. And were you present with an attorney at that time? A. Yes.

Q. And after the deposition was taken, did you read it and sign it as being correct?

A. Yes. [33]

Q. Referring to page 16 of this deposition, line 22, this is testimony that was given at that time:

"Q. On these jobs that you have gone out to look at, have you ever made any suggestions?

A. Surely.

Q. And you expected them to be followed?

(Testimony of Milton L. Lee.)

"A. Well, if I made a suggestion, I certainly would.

"Q. Have you ever given any directions?

"A. To an applicator?

"Q. Yes?"

Q. (By Mr. Ewing): Now, is that true?

A. Well, you have asked me a series of questions in which you said have I ever given them any directions. Well, as I said here a few minutes ago, if we had an addition for a job, or a change in the procedure, why of course I would give them directions. You asked me if I would tell a man how to do a specific job at a specific time. I don't remember ever doing it.

Q. Now, I didn't ask you whether you told him how to do the whole job, I just asked you whether you have been out on jobs and ever given directions in reference to that job, maybe on only one particular point on that job?

A. I said I couldn't remember having done it.

Q. Well, is your testimony in the deposition correct, [34] referring to page 17, line 1:

"A. Well, if I made a suggestion, I certainly would." Indicating that you wanted them followed:

"Q. Have you ever given any directions?

"A. To an applicator?

"Q. Yes.

"A. If the occasion arose, I would, yes."

A. Yes, I think that is accurate.

Q. (By Mr. Ewing): Later on, on the same page, and down at line 17:

(Testimony of Milton L. Lee.)

"Q. Well, I am just speaking generally, not of any particular job, but just of all the jobs in general. You say you can't remember of your own knowledge when you ever have given any directions, is that right?

"A. Well, no, I don't.

"Q. But you had the power to give the directions? A. Yes.

"Q. And if those directions weren't followed, what, if anything, would happen to the applicator?

"A. Well, we would be inclined not to give him another job."

Q. (By Mr. Ewing): Is that about right? [35]

A. Yes.

Q. Has there ever been a time within your knowledge when an applicator has been put off a job during the course of that job? I think you have already testified on direct that you have discharged applicators during the course of the work for reasons, not doing satisfactory work, or something similar to that, is that right? A. Yes.

Q. Do you feel that you have the power to discharge a man during the course of a job?

Mr. Lyman: Objection, your Honor, when he says the question, "Do you feel that you have the power," that is getting into conjecture, that is for the Court to decide on the line of facts.

The Court: No, no, overruled.

Q. (By Mr. Ewing): The question is: Do you have the power to discharge a man off his job during the course of that job?

(Testimony of Milton L. Lee.)

A. For bad workmanship?

Q. Well, for any reason? A. Yes.

Q. Would there be times when a home owner or customer would call into your office during the performance of the work and say he was dissatisfied with the work that that applicator was doing, does that ever happen? [36] A. Yes.

Q. What would be done then in reference to that applicator, would he ever be taken off a job?

A. Well, I don't recall an instance in which a man was taken off a job for that reason under those circumstances.

Q. Again referring to the deposition, on page 22, line 23:

"Q. Would there be times when a home owner would call into your office during the performance of the work and say he was dissatisfied with the work? A. Yes.

"Q. What would be done then?

"A. Well, on occasion the job would be taken away from the man that was doing it, and on other occasions the home owner would probably be educated as to why he was doing what he was, and some cases the home owner would complain about the work being done when maybe it was a matter of what he had to work with."

Skipping down to line 18 on page 23:

"Q. Would that be done strictly on the word of the home owner over the telephone?

"A. No.

(Testimony of Milton L. Lee.)

"Q. Somebody would go out and look at the job? [37]

"A. They don't do anything strictly on what a person might say, a snap judgment.

"Q. Somebody from your office then would go out and look the job over at that time?

"A. Surely.

"Q. And the person that went out from your office would inspect the job at that time and find out what the dissatisfaction was about, I assume, is that right? A. Yes.

"Q. And if that representative from your office felt that the work was not being done in a satisfactory manner, then that person who went out from your office would excuse that applicator from that job?

"A. Yes, that is about the way it would work, yes."

Q. (By Mr. Ewing): Now, is that, as I have just read, correct?

A. That is essentially correct.

Q. Did the installers share in the profits or losses of your business at all? A. No.

Q. Were there any occasions that you know of where an installer was taken off a job before it was completed and moved to another job? [38]

A. Oh, yes, there have been several occasions when installers have been asked to go from one job to another.

Q. Who were they asked by?

A. Well, usually Mr. Williams, I would say.

(Testimony of Miltou L. Lee.)

Q. And if he asked them to go, I assume he meant what he was saying, they had better go, is that right?

Mr. Lyman: Objection, your Honor.

The Court: Sustained.

Q. (By Mr. Ewing): When Mr. Williams told a man to go to another job after he had started one, as a rule did these applicators go?

Mr. Lyman: Objection, your Honor, this is hearsay. Mr. Williams is here.

The Court: Sustained.

Q. (By Mr. Ewing): You say that there were occasions, however, when a man was taken off a job before it was completed and moved to another job?

A. Well, if I understand your question, sir, he was terminated on one job and put on a job.

Q. To your knowledge, was an installer ever taken off a job that he had originally started, was he ever taken off that job before it was finished and put on some other job?

A. Oh, I know of occasions when they have had two or three jobs running concurrently, yes. [39]

Q. Did the installer, do you know of your own knowledge whether the installer who was moved to the second job always returned to the first job?

A. I don't know of any situation when he didn't return to the first job.

Q. You don't know whether that has happened or not, is that correct?

(Testimony of Milton L. Lee.)

A. Well, I know that they always returned to their original jobs and finished them.

Q. Isn't it true, Mr. Lee, that you have always considered these installers that have worked for you to be contract employees?

Mr. Lyman: Objection, your Honor, this is a legal conclusion he is asking the witness.

The Court: Sustained.

Q. (By Mr. Ewing): Referring to the deposition, on page 27, beginning at line 3:

"Q. Will you state whether or not you felt that you could move the installers around from one job to another at your discretion?

"A. Well, the applicators and installers with us have always been considered to be contract employees."

Mr. Lyman: Objection, your Honor, the fact that it [40] is in the deposition doesn't cure anything. It is not an inconsistent statement and before counsel can use a deposition it seems to me he has to show, first, that there is an inconsistent statement which is inadmissible in evidence.

The Court: No, he can use the deposition for any purpose.

Mr. Lyman: Do I understand the Court correctly to say to make admissible what would ordinarily not be admissible?

The Court: No, that isn't what I had in mind. What is inadmissible about that, that is a statement by this witness against interest, isn't it?

Mr. Lyman: Well——

(Testimony of Milton L. Lee.)

Mr. Ewing: It's my understanding, your Honor, and I intend to do so after I finish questioning this witness, I intend to admit the entire deposition into evidence for substantive purposes, and I understand under Federal Rules of Civil Procedure, Points B and 27-F, that such a thing can be done in this type of a situation.

Mr. Lyman: Well, your Honor, I understand that the deposition is admissible if the witness is not present or to prove inconsistent statements which would be evidentiary.

The Court: Mr. Ewing, you mean Rules 27-B and 27-F? You had better get a better rule. [41]

Mr. Ewing: Excuse me, your Honor, 26, Rule 26. I am referring to 26-D 1 and 2, and 26-F.

The Court: If this were the president of the corporation or the managing agent, I would see no reason why D-2 wouldn't apply to him, do you?

Mr. Lyman: Sure, but my point was, your Honor, certainly it can be used for any purpose but not to make admissible what is obviously inadmissible evidence. For instance, if you asked him a legal conclusion which is inadmissible, which is objectionable, and the Court sustained it, it isn't cured by the fact that he might have asked it on a deposition.

The Court: That is true, the conclusion you are talking about is when he referred to his contract employees, I assume. I presume, however, since that particular question has reference to "contract employees" which would indicate it was calling for a

(Testimony of Milton L. Lee.)

legal conclusion, and so, therefore, the particular question might be sustained in that respect, but that doesn't make the deposition inadmissible. It can be used for more than impeachment, Mr. Lyman.

Mr. Lyman: Yes, I understand that.

The Court: And this particular question, I will sustain the objection on the ground it calls for a legal conclusion.

Mr. Ewing: As to the answer I would move that it [42] should be considered and can be considered based on the principle that it is an admission against interest.

The Court: Well, what do you mean by "contract employee"?

Mr. Ewing: Well, I don't know what he means, I am going to ask him that.

The Court: That was your question, though, you used the term, he didn't.

Mr. Ewing: Well, originally he used the term.

The Court: Well, you haven't read any place yet where he used the term.

Mr. Ewing: Well, I stated in his deposition his answer to a question was:

"A. Well, the applicators and installers with us have always been considered to be contract employees."

That is his answer to a question of mine.

The Court: What was your question, again?

Mr. Ewing (Reading):

"Q. Will you state whether or not you felt that

(Testimony of Milton L. Lee.)

you could move the installers around from one job to another at your discretion?"

The Court: You are not objecting to that question, are you, Mr. Lyman? [43]

Mr. Lyman: No, that question is all right.

The Court: All right. Then, the answer should be, likewise, admissible, shouldn't it?

Mr. Lyman: Well, it is not responsive here. I see what you mean, your Honor; it is not responsive here in the deposition.

The Court: Well, I wouldn't say it isn't responsive. I think from what Mr. Ewing just read it is responsive. You might not like the answer but it is still responsive.

Mr. Lyman: Oh, yes. If the Court please, in the next question Mr. Ewing says:

"Q. That wasn't the question——"

so he has disowned it, himself.

The Court: Well, that doesn't mean it is not admissible now, does it? He can ask him again twice or three times.

Mr. Lyman: Again, he said:

"Q. That isn't the question, Mr. Lee. The question was, if you can state whether or not you felt that you could move one installer from one job to another at your discretion?"

"A. I don't feel that way, and I never have, no."

That is not a responsive question and answer because Mr. Ewing [44] has disavowed all these things before.

(Testimony of Milton L. Lee.)

The Court: His disavowal doesn't take them out of the deposition.

Mr. Lyman: His disavowal doesn't take them out of the deposition but I think it should not be admissible to cure a witness who is prohibited from answering to a legal conclusion.

The Court: Well, I think under the circumstances since it is his term, well, I am not saying what the effect of it would be, but I think I will let it stay in. I think I will permit the answer.

Q. (By Mr. Ewing): Taking, first, your reasonable experience in this type of work, Mr. Lee, isn't it true that the job can be done without close supervision?

A. Well, as I said before, it is being done, we have never had close supervision for it.

Q. Isn't it true, I believe you stated on your direct, that these installers usually have two or three years' experience in this type of work, isn't that correct?

A. No, I didn't answer that. I was asked how many years' experience they had in this period of time, and I said I thought about two years' experience, on an average.

Q. Well, taking an installer of two or three years' experience, would it be necessary to watch him closely in order to do this work, in order to do a job properly? [45]

A. Well, we would be more aware of what he turned in.

Q. What do you mean by that?

(Testimony of Milton L. Lee.)

A. Well, I think we would be a little more cautious about whether or not he brought in the payments when he finished the job, which they are supposed to do, and a man that had had more experience, and by that we would be guided.

Q. Taking a man of five to ten years' experience, would it be necessary, in your opinion, to watch him closely in reference to him doing his job?

A. I don't know what you mean by watching him closely, I mean.

Q. You state that you do not hire supervisors, is that correct? A. That is right.

Q. Now, what is your definition, what would you term a supervisor?

A. Oh, a man whose sole job it was to go around and see that somebody else did a job.

Q. And taking that job description which you just gave, would a person like that be necessary in this type of work? In other words, is it necessary to have somebody stand over that man, watching him all the time, in this type of work?

A. No. [46]

Q. And as pointed out in your deposition, you have at times gone out and checked work, haven't you? A. Yes.

Q. And you have given suggestions before, haven't you? A. Well, sure I have.

Q. And you have given directions before, haven't you?

A. Well, what do you mean "directions"?

Q. Yes or no.

(Testimony of Milton L. Lee.)

A. Direction? I have already testified that if I had a change in the job or a change in the procedure, I would give directions, of course.

Q. Has Alsoco ever issued directives to installers, I will call them directives, or bulletins, or something to that effect?

A. Yes, we have issued bulletins.

Q. So there are things in writing other than just the work orders that are issued to the installers, is that correct?

A. Well, yes, there is more or less a general set of rules, there have been from time to time.

Q. What do you mean by "general set of rules"?

A. Well, they would outline procedures that we would like to have followed in the prosecution of a job.

Q. Who is "they" when you refer to "they"?

A. The bulletins. [47]

Q. They would outline the procedures which you would like to have followed? A. Yes.

Q. Isn't it true that you expected them to be followed?

A. Well, I think that could be said, yes.

Q. As I understand your testimony on direct, when a job was completed the installer, if it was not a cash transaction, the installer was to get a completion slip signed by the home owner, is that correct?

A. We generally required one or the other, yes.

Q. Was an installer ever paid for that job before he got that completion slip signed? A. Yes.

(Testimony of Milton L. Lee.)

Q. In full? A. Yes.

Q. What is the necessity for the completion slip?

A. So the company can get its money.

Q. And who picks up the money if it is a cash transaction?

A. Well, it could be picked up at the time of completion of the job by the installer, it could be picked up then or later by a salesman, or it could be mailed into the company by the customer.

Q. If the installer picks up the money, he delivers it to one of Alesco's representatives, I assume?

A. Correct. [48]

Q. How is the installer paid, is he paid by check or is he paid out of the cash?

A. Paid by check.

The Court: Mr. Ewing, let us have a recess now for ten minutes.

(Whereupon, a recess was taken for a period of ten minutes.)

Q. (By Mr. Ewing): Mr. Lee, have there been instances within your knowledge when the home owner did not sign the completion slip?

A. Yes.

Q. And generally what would be done then, if he didn't sign the slip, if the customer did not sign the slip? A. We would ask him why not.

Q. Would the installer bring that slip back to you and tell you what the complaint of the home owner was? A. He could have, yes.

(Testimony of Milton L. Lee.)

Q. And assuming that there had to be some more work done on that job in order to satisfy the home owner, would that installer be returned to that job to do that work? A. Yes.

Q. Would it always be that installer that went back to finish that job?

A. If he was still around, it would always be that installer, yes. [49]

Q. You are sure of that?

A. That is my knowledge.

Mr. Ewing: At this time, your Honor, I would move the admission of this deposition taken in November of 1960, of Milton Lee's, for substantive purposes.

Mr. Lyman: Your Honor, I don't understand that, the witness is here. If there is any inconsistency, certainly it's counsel's position to bring it out, but to put the whole deposition in as evidence, I think it's immaterial in the first place, and I object to it. [50]

* * *

The Court: I think that is what the rule says, so I will admit the deposition and consider it as evidence. I assure you that I will not consider the immaterial testimony as being binding upon you. [52]

* * *

"DEPOSITION OF MILTON L. LEE

Appearances:

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DALE M. GREEN,

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ROBERT F. EWING,

Assistant United States Attorney,
For the Defendant.

Deposition of Milton L. Lee, taken on behalf of the defendant in the above-entitled causes, before Donald B. Oden, Notary Public, pursuant to stipulation of counsel, at 1:30 o'clock p.m. on the 21st day of November, 1960, Federal Building, Spokane, Washington.

Mr. Ewing: Let the record show that this deposition is being taken pursuant to agreement [53] between co-counsel for the plaintiffs, Willard J. Roe, and Robert F. Ewing, Assistants United States Attorney, pursuant to the Federal Rules of Civil Procedure.

Let the record also show that the plaintiffs are represented at the taking of this deposition by Willard J. Roe, co-counsel for the plaintiffs.

Anything further?

(Off the record discussion.)

Mr. Ewing: Yes, all objections will be deemed to be reserved until time of trial.

I will be asking most of the questions and answer as directly as you can.

“MILTON L. LEE

being first duly sworn, was examined on behalf of the defendant and testified as follows:

“By Mr. Ewing:

“Q. What is your name, please?

“A. My name is Milton L. Lee.

“Q. And your address?

“A. West 3236 Houston, Spokane, Washington.

“Q. And what is your occupation?

“A. I am the Manager of Alsco Northwest.

“Q. By Manager, you mean also President of Alsco Northwest? [54]

“A. Well, my present occupation is Manager.

“Q. What was your status with Alsco Northwest from 1955 through 1958?

“A. I was President.

“Q. That is with Alsco Northwest?

“A. Alsco Northwest, Incorporated.

“Q. And were you also President of Alsco Storm Windows, Inc.? A. I was.

“Q. And were you President of that company from 1955 to 1958? A. Yes.

“Q. And in your capacity as President of these

(Deposition of Milton L. Lee.)

two corporations, do you know what the process was for receiving work orders to be given to installers? A. Yes, I do.

"Q. And what was that procedure? How did you receive the work orders?

"A. Well, we received the work orders from dealers and field representatives.

"Q. Were these dealers and field representatives employees of yours? A. Sometimes.

"Q. And those who weren't employees, what was their [55] status in reference to your company?

"A. Well, they would be independent dealers, just buying from us.

"Q. And these are the people that you received work orders from; I mean, they got the orders for you?

"A. They made out the orders, as a rule, yes.

"Q. When you had a work order to be fulfilled, how were the installers notified of such?

"A. Well, they would be notified, or they were notified through our plant manager.

"Q. And what is his name?

"A. Ralph Williams.

"Q. And when Mr. Williams notified a particular installer that he had a work order for him, that installer would then come down to the plant?

"A. That's right.

"Q. Do you have a copy of a work order with you? A. I do.

"Q. Would you be able to turn that over to me at this time?

(Deposition of Milton L. Lee.)

"A. Uh-huh. (Document handed to Mr. Ewing.)

"Q. This is a copy of a work order that has been processed or been used?

"A. Yes, this copy was processed in 1956. Well, it was actually processed in '57. [56]

"Q. Was there any agreement between your company and an installer other than the work order? Was there any agreement in writing between your company and an installer other than the work order?

"A. No, there never was any written agreement, to my knowledge.

"Q. The only written agreement between your company and the installers was this work order?

"A. Well, there is no written agreement between us and the installer in the work order.

"Q. This was the only thing in writing, the work order was the only thing that was in writing?

"A. That's right.

"Q. To your knowledge, were any of those installers members of any union?

"A. Well, I wouldn't want to be specific as to that, but I think some installers have belonged to unions, yes.

"Q. You didn't hire them on a union status?

"A. No.

"Q. In other words, preference call or anything like that? A. No.

"Q. Were pay negotiations entered into upon the acceptance of a work order by an installer? [57]

"A. Yes. As a matter of fact, we have had vari-

(Deposition of Milton L. Lee.)

ous meetings with these fellows and more or less outlined the pay arrangement, with the understanding that if there is anything that isn't specifically covered in this piece work schedule, it would be a matter of negotiation with us.

"Q. How were the installers paid? Were they paid by the hour?

"A. Oh, they are paid by the piece and by the job.

"Q. Was there any other talk between the installer and the representative of your company at that time, that you know of your own knowledge, other than just pay negotiations?

"A. Are you speaking of this meeting?

"Q. No, no. When an installer came in, I assume that somebody in your company, one of your representatives or you, asked the installer if he would accept this work order, is that right?

"A. Yes.

"Q. And was there any other conversation in reference to the particular job at that time?

"A. You are not speaking of this particular job?

"Q. No, not this particular one, but——

"A. Well, as a rule, no. On occasion, however, a job would be turned down by a fellow, and [58] then, of course, I would be called in to negotiate some kind of a settlement with him.

"Q. In the event that a work order was offered to an installer and he did turn it down, what happened then?

(Deposition of Milton L. Lee.)

"A. Well, we usually called in another fellow.

"Q. And what happened to the particular fellow that refused the work order? Was he given another?

"A. He would wait to get another one, or maybe he would, maybe he wouldn't. I mean, he could. Just because he turned down a deal wouldn't necessarily forfeit his right to further jobs.

"Q. Was he offered another work order if he turned down one?

"A. Well, that would depend entirely on the man.

"Q. Which man, the installer or your organization?

"A. Well, the installer, yes, because these jobs vary in degree of skill they need to perform, and if you had a particularly difficult job, you would try to call in a man that you thought was capable of doing it. If he turned it down, you would probably go looking for somebody else to do it, but, as I say, that man wouldn't necessarily be out, he wouldn't forfeit his right to another job. [59]

"Q. Would you call that particular man that turned down a work order, would he be called back as soon as another work order came in?

"A. Ordinarily he would, yes.

"Q. By his refusing to accept a work order, he wasn't laid off any amount of time?

"A. Well, that kind of work, you don't lay anybody off.

"Q. Was there any disciplinary action so far

(Deposition of Milton L. Lee.)

as you were concerned as to an installer who refused to accept a work order?

"A. Well, I don't believe that issue has ever come up with me.

"Q. You don't know of any disciplinary action that has been taken against an installer who refused to accept a work order?

"A. No, I don't. Usually when a fellow turned down a work order, it was a matter of negotiation to figure out—it is usually because of price, that is what I am getting at.

"Q. Have there been installers come into your office, not having been called by you, but just come in looking for work? A. Yes.

"Q. And if you didn't have a work order to give them [60] at that time, would you do anything?

"A. Well, we might try to make a note of the fact that the fellow is available.

"Q. Have you ever referred him to a competitor of yours who may have a work order?

"A. Yes, numerous times.

"Q. When you don't have work for them, you have referred them to some other competitor?

"A. Yes, yes, absolutely.

"Q. Have they taken that other job, do you know of your own knowledge?

"A. Oh, sure. Yes.

"Q. Is it your opinion that the installers were free to accept or reject any work order that was offered to them?

(Deposition of Milton L. Lee.)

"A. It has always been a matter of practice that they do it.

"Q. Were there jobs which required more than one applicator? A. Yes.

"Q. Generally, how many would work on a particular job? How many installers?

"A. Well, as a general rule in the storm window business, it is a one-man job. However, they very often hire helpers. That is the usual [61] practice. If they need more help, they go out and hire themselves a helper.

"Q. Would there be more than one applicator on a particular job, though? I use applicator and installer interchangeably, so— A. Yes.

"Q. —I don't want to confuse you.

"A. No, I understand. Well, there could be, yes.

"Q. In the event two applicators were working on a particular job and a question came up as to how that job should be performed, which applicator's word would control?

"A. Well, I wouldn't know. There is no rule that I know of.

"Q. Do they usually refer those matters to you?

"A. Yes, that would be a situation where, if they disagreed on how they could get the job done, naturally neither one of them would make any money until they got it settled, so they would usually refer it to the plant manager or myself.

"Q. You say on some jobs there would be other than the installers; in other words, there would be helpers? A. Yes.

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"Q. Or apprentices?

"A. Frequently. [62]

"Q. And who would hire them?

"A. Well, from personal knowledge, I couldn't say, but I would assume that the applicator himself hired them.

"Q. You didn't?

"A. We didn't, no, the company didn't hire them.

"Q. Has there been any instance where a helper's work was unsatisfactory on a particular job and he had to be discharged?

"A. Oh, we wouldn't have any knowledge of that. If the work was unsatisfactory, it wouldn't be the helper we would go to, we would go to the applicator.

"Q. You didn't discharge any helpers?

"A. No, we wouldn't have any means of discharging a helper if he is hired by somebody else.

"Q. Did you handle the pay records of the helpers at all?

"A. Well, not as a rule, we didn't. We might have in particular instances where an applicator would ask us to pay the helper out of the gross proceeds, we might have done it, but as a rule we didn't pay helpers.

"Q. You say in some instances for the convenience of the installer you would handle the pay records [63] for that installer? A. Yes.

"Q. Did you deduct taxes, and so forth, from the helper's checks?

"A. Without referring to them, I couldn't say,

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but presumably we handled them in the normal course of business, that is, like we would handle anybody else's. Of course, when you are speaking of helpers, I assume you mean the second man in a crew?

"Q. Well, somebody other than an installer.

"A. Yes. Well, they lots of times might team up and it wouldn't necessarily be an installer and a helper, might be just two fellows. As a crew, you might say.

"Q. You say the helper—we'll call him the helper—he was hired by the installer, is that right?

"A. I have already said that.

"Q. Would this require your approval?

"A. No. Not even my knowledge.

"Q. Who furnished the materials that went into any particular job?

"A. You mean who delivered them to the installer?

"Q. Well, the materials were purchased by your Company, were they not?

"A. As a rule, yes. If they were our contracts, we [64] certainly bought the materials.

"Q. Who delivered them to the job site?

"A. Well, it would depend on what they were and where they were obtained. Sometimes they were delivered to the job site by the company and sometimes the installer would deliver them to the job site.

"Q. Sometimes the installer would come to the company and pick up the materials and deliver them?

"A. As a rule, with windows and doors, that is

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what they do, they pick up the materials at the plant.

"Q. By 'they,' you mean installers?

"A. Installers, uh-huh.

"Q. Was anything else furnished by your company other than materials?

"A. Are you speaking of equipment, maybe?

"Q. Equipment?

"A. No, except on rare occasions we might loan out ladders, and so forth, but as a practice, we didn't furnish any tools.

"Q. As a practice, you didn't furnish anything other than materials, is that right?

"A. Yes, material, uh-huh.

"Q. In the event an installer broke one of his tools, who would pay to get him a new one? [65]

"A. He would.

"Q. Was he reimbursed? A. No.

"Q. Did your company have any supervisors or other personnel that would go out on jobs that were in the process of being completed and observe them and give any instructions or suggestions?

"A. Not as a general rule, no. The plant manager might on occasion check a job, or if there is a complaint, we would send somebody out, but we didn't employ supervisors.

"Q. Did any of your salesmen go out and look the jobs over?

"A. Oh, as a matter of fact, they are supposed to, but as a rule, I don't think they ever go near a job.

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"Q. Well, there is nobody to watch the procedure of this work as it is going on at all from your office? A. No.

"Q. In other words, the installer just went out and started a job and worked right on through, and when he was finished, came in and got another work order, and there was nobody from your office, no representative from your office, ever went out [66] to check the work at all? A. No.

"Q. So if questions came up during the performance of the job, the installer would just contact your company?

"A. The installer usually contacted the plant foreman, and if he thought it was necessary, he would refer it to me.

"Q. Well, did either the plant foreman or you ever go out and look at a job? A. Yes.

"Q. And when you got out to the job, would you make some suggestions based on what their problem was? A. Surely.

"Q. And you expected those suggestions to be followed?

"A. I don't think I quite follow you.

"Q. If you went out and looked at a job and there was some dispute, say, as to the installer, that is the reason you were out there, would you make some suggestion to the installer in order to get the problem straightened out?

"A. Well, I am not aware of any situation that has come up where the installer has been in dispute with the company about how to do something. It

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is usually a situation where the homeowner, the [67] customer, has got some question that the installer just doesn't know enough or is not familiar with the contract so he can't settle it himself, so in a situation like that, they usually refer it back to the office and somebody contacts the customer. In other words, an effort is made to try to satisfy the customer and then, of course, the installer is advised as to that, and that is usually what it amounts to.

"Q. The installer is advised by you or one of your representatives?

"A. He would either be advised by one of us or the customer himself.

"Q. The installer was, I suppose, supposed to follow whatever instructions you gave him?

"A. Surely.

"Q. But you say the only instances when you went out to look at a job is when you were called about some question that came up on the job; in other words, if no questions arose during the performance of the work, nobody from your company would go out and look at a job?

"A. Well, I would say not necessarily.

"Q. What do you mean by that?

"A. Well, if you are asking me to say positively that [68] nobody ever went out to a job, I couldn't say. You started out to ask me if we had supervisors, if we employed supervisors, or make a practice of seeing these jobs in the course of construction. We don't. On the other hand, if there is a job going up across the street from me, I would obvi-

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ously take a look at it, maybe just out of my own curiosity, but we didn't supervise the applicators in the sense that you are talking about it.

"Q. On these jobs that you have gone out to look at, have you ever made any suggestions?

"A. Surely.

"Q. And you expected them to be followed?

"A. Well, if I made a suggestion, I certainly would.

"Q. Have you ever given any directions?

"A. To an applicator?

"Q. Yes.

"A. If the occasion arose, I would, yes.

"Q. And you expected him to follow those directions that you gave?

"Mr. Roe: I object. It is leading.

"Q. (By Mr. Ewing): You stated that there have been times when you have given directions to an applicator, is that right? [69]

"A. No, I didn't say that. You asked me if I would give them directions, and I said I would and if I gave them, I would expect them to be followed, yes. My day-to-day knowledge of these applications is not such that I would be in that position.

"Q. Well, I am just speaking generally, not of any particular job, but just of all the jobs in general. You say you can't remember of your own knowledge when you ever have given any directions, is that right? A. Well, no, I don't.

"Q. But you had the power to give the directions? A. Yes.

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"Q. And if those directions weren't followed, what, if anything, would happen to the applicator?

"A. Well, we would be inclined not to give him another job.

"Q. He would be discharged?

"Mr. Roe: I object. It is leading.

"Q. (By Mr. Ewing): If the installer didn't follow your directions, he just wouldn't be given any more work orders; is that what you are saying?

"Mr. Roe: I object. It is leading.

"Q. (By Mr. Ewing): What, if anything, would happen to an applicator if he didn't follow your [70] directions?

"A. Well, there have been times when an applicator hasn't done a job properly. We don't give him another one.

"Q. That is after the job is finished?

"A. Well, yes. Remember, I said that our contact with these jobs in progress hardly exists.

"Q. Has there ever been a time within your knowledge when an applicator has been, I won't say discharged, but put off the job during the course of that job?

"A. Well, I don't exactly remember the incidents, but I'm sure there have been, yes.

"Q. In that event, they just wouldn't get any more work orders?

"A. That's right. If we felt their work was not satisfactory on that job, we wouldn't be giving them another one.

"Q. Is it my understanding that you had the

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power to give directions; even though you may not have exercised it, you felt you had power to give directions as to how the job should be performed?

"Mr. Roe: Object. That question calls for a conclusion of the witness as to what the interrogator's understanding is.

"Q. (By Mr. Ewing): Assuming that you never gave [71] directions to an applicator, you state that you felt that you had the power to give directions to an applicator?

"Mr. Roe: I object. It is leading.

"Mr. Ewing: Why is it leading?

"Mr. Roe: Would you read it again?

"(Question read.)

"Mr. Ewing: I think he has already answered that once and I just wanted to make sure as to whether he has.

"(Off the record discussion.)

"Q. Did you have the power to give directions, Mr. Lee?

"A. Yes, in making a deal with an applicator to apply a job, at least I would assume that you would have the power of instructing him as to the way it should be done. Unwritten law in the business, you might say.

"Q. Did you, in fact, instruct installers as to how the job should be done?

"A. Oh, on occasion, yes.

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"Q. There were occasions during the performance of the job?

"A. No, no, I didn't say during the performance of it.

"Q. When were these instructions given, after the job [72] was finished?

"A. No, when this order was ready for delivery to an installer, if there were any specific information that the installer should need, such as taking out long ladders or roof jacks or ladder jacks or scaffolding or special tools or something that we had knowledge of that the installer should know about, why, naturally we would instruct him as to how to do it, what to take out.

"Q. Were there any directions given during the performance of the work?

"A. Oh, if an applicator called in and he needed some advice on the subject or on the application of it, I presume we would, yes.

"Q. Are you stating that the only time you intervened during the performance of a job was when an installer called you?

"A. No, but it would be necessitated by a call from the installer or a call from the customer, or both.

"Q. That is why I say, the only time that you gave directions or intervened during the performance of a job was when it was initiated either by the installer or the homeowner?

"A. As a rule, yes. [73]

"Q. Did you ever go out on the job during the

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performance of the work without being called by an installer or applicator?

"A. Oh, I have been on many jobs when there was no specific call, yes, but I wasn't there to inspect the work, necessarily.

"Q. What were you there for?

"A. Oh, I would be there to talk to the customer, straighten out the financing.

"Q. As an incident to that visit—

"A. Show another customer a job being installed or show a dealer a job being installed. There is lots of reasons.

"Q. But you say that you never looked the work over or inspected the work when you were out on those type of visits?

"A. I didn't state that.

"Q. Well, did you look the work over when you were there? A. Sure.

"Q. Did you make any suggestions? If you felt that something wasn't right, did you ever make a suggestion?

"A. I didn't do that as a matter of practice, no.

"Q. Well, you just stated that there have been numerous [74] occasions when you did inspect the work? A. That's right.

"Q. But you are saying that you very seldom said anything? A. That is correct.

"Q. Were there times when you gave suggestions or directions during the performance of a job that you had gone out to look at?

"Mr. Roe: If you can recall.

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"A. I don't recall of any job where I have intervened with the installer, no.

"Q. (By Mr. Ewing): Do you know of your own knowledge of anybody else that represents your company has gone out to look at jobs and inspect them? A. No.

"Q. You are the only one that does the inspecting?

"A. I know of my own knowledge that there would be others that would be in the same position I would that would be on the job, yes, but I have no knowledge as to whether they would intervene with the installer or whether they wouldn't.

"Q. In the event a homeowner was dissatisfied with the installer's work, what would be done then?

"A. Well, there is no general rule as to how you satisfy a homeowner. You do it the best way you can. [75]

"Q. Would there be times when a homeowner would call into your office during the performance of the work and say he was dissatisfied with the work? A. Yes.

"Q. What would be done then?

"A. Well, on occasion the job would be taken away from the man that was doing it, and on other occasions the homeowner would probably be educated as to why he was doing what he was, and some cases the homeowner would complain about the work being done when maybe it was a matter of what he had to work with. I am speaking of the windows and the doors that he was installing or the

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opening that he was putting them on. I say there is no general rule as to how you take care of a complaint.

"Q. You stated that there were times when the homeowner would call and state that he was dissatisfied with the installer's work and you would take that installer off that job?

"A. Well, I can't remember that I ever did that, but I'm reasonably sure that it has happened.

"Q. Would that be done strictly on the word of the homeowner over the telephone? A. No.

"Q. Somebody would go out and look at the job? [76]

"A. They don't do anything strictly on what a person might say, a snap judgment.

"Q. Somebody from your office then would go out and look the job over at that time?

"A. Surely.

"Q. And the person that went out from your office would inspect the job at that time and find out what the dissatisfaction was about, I assume, is that right? A. Yes.

"Q. And if that representative from your office felt that the work was not being done in a satisfactory manner, then that person who went out from your office would excuse that applicator from that job?

"A. Yes, that is about the way it would work, yes.

"Q. Were there any set hours that an installer would have to work? A. None.

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"Q. There wasn't any time which he had to be there in the morning? A. No.

"Q. Or leave in the evening? A. No.

"Q. Did the installers share in the profits or losses of your business? [77] A. No.

"Q. Were there any occasions that you know of where an installer was taken off one job before it was completed and put on another job?

"A. Well, not to my knowledge, I don't know of the number of times when an installer would be taken off a job. They are few. As a matter of fact, I am not aware of one, although I'm sure in 15 years it could happen.

"Q. You say that there were a number of times when an installer was taken off a job?

"A. I say the number of times would be few. There were only a few occasions when that would ever come up, and I'm not aware of one.

"Q. Are you aware of any instances where an installer was taken off a job before it was finished and put on another job? Say, for instance, you had a death?

"A. I know of one particular instance where a man left a job before it was finished.

"Q. That was of his own will, voluntarily?

"A. Well, he was just gone for three or four days. We got somebody else to finish the job and then eventually he came back. Pretty upset that we had done it, but we did. [78]

"Q. Were there certain deadlines to be met on some of these jobs?

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"A. Of course. There is a deadline on every job.

"Q. In that event, if an applicator was working on one job and your deadline was about to be met on another job, would that installer be taken off the job he had originally started and put on that one where the deadline had about run out?

"A. Well, I am not familiar enough with the operation of these applicators as to moving from one job to another to say that. Applicators are usually given a certain amount of work to do. We are speaking of specific jobs. Sometimes he might be given a dozen contracts at one time. If the customer called up in the process of this load of windows he is installing and said, 'If you don't put my windows on, I'll cancel,' I imagine, as a matter of courtesy, the applicator would stop one job and start another, but that isn't being taken off one and put on the other, that is just a routine business transaction. I mean, you have emergencies like that. That is about the way you would handle it.

"Q. In those instances, how would the installer be paid for that job that he went onto; in other [79] words, the second job?

"A. Just exactly like he would have been paid if it hadn't happened that way.

"Q. You mean he would be paid by the unit for the work on the second job? A. Sure.

"Q. And when he finished that job, he would go back to the job that he originally started?

"A. Well, when he finished both jobs, he would bring them in and get paid for both of them, the same as if he did one and then he did the other.

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"Q. Will you state whether or not you felt that you could move the installers around from one job to another at your discretion?

"A. Well, the applicators and installers with us have always been considered to be contract employees.

"Q. That wasn't the question——

"A. As such, we treat them as individuals with a certain amount of ability.

"Q. That isn't the question, Mr. Lee. The question was, if you can state whether or not you felt that you could move one installer from one job to another at your discretion?

"A. I don't feel that way, and I never have, no.

"Q. As a matter of fact, you did move them when [80] somebody called, say, on one job and said, 'I've got storm windows I've got to get up,' and this particular applicator was working on another job, you could call him and send him to that other job, could you not?

"A. Well, only if he is willing to go.

"Q. But you would ask him to go, wouldn't you?

"A. I sure would.

"Q. What if he didn't go?

"A. You mean what would I do if he didn't go?

"Q. Yes. A. I don't know. I don't know.

"Q. That has never arisen?

"A. Well, I don't think it has. I don't remember any instances like that when any applicators haven't been more than willing to co-operate. After

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all, they get paid for the same work that we would get paid for.

“Q. So as a general rule when you did ask them to go from one job to another, they went?

“A. They did, yes.

“Q. Taking a person of reasonable experience in this type of work, isn’t it true that the job could be done without close supervision?

“A. Well, it is being done without close supervision, [81] yes.

“Q. And taking a man who is reasonably experienced in this type of work, isn’t it true that he could do the job with little or no supervision?

“A. They are doing it.

“Q. Could an applicator substitute materials that were purchased by you for the job? In other words, could he use materials other than those which you delivered to this job site?

“A. Could he?

“Q. Yes. A. That is possible.

“Q. Would this be with your approval or of representatives of your firm?

“A. Well, I guess I misunderstand. You say could he use somebody else’s material. Well, he could. Well, if he could do it and we have no control over him, why, he would, wouldn’t he? I mean, I don’t quite follow what you——

“Q. I am not asking whether you have any control over him or not, I am asking you if the installer could use materials other than those which were delivered by you for a particular job? Would

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he have to use just those materials which were delivered by you? [82]

"A. He was supposed to use what is ordered to the job, yes, sir.

"Q. And if other materials were needed, could he go ahead and buy those other materials? What would be the situation there?

"A. The usual practice is that he would buy the other material and use it, yes.

"Q. You wouldn't buy the other materials?

"A. We would, yes, on occasion. It would depend on where the job was and how much the material cost and its availability and proximity to the job. A lot of things would enter into it. He would do that or sometimes we buy for him.

"Q. Could the installer substitute materials other than those that were in the work order without your approval?

"A. Well, I think you would have to be more specific than that.

"Mr. Ewing: Would you read the question back?

"(Question read.)

"Mr. Roe: I don't understand that question myself. If the materials aren't in the work order, why would he even have any need for them on the job? What kind of materials would he be [83] substituting?

"Q. (By Mr. Ewing): I assume that these materials that are on the work order, it doesn't always

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exactly work out that those are just the materials that are needed for that particular job. Are there times when other materials are needed other than those which are in the work order? A. Yes.

"Q. And as to those other materials, before the applicator put those other materials into the job, would he call you for your approval first?

"A. Not as a rule.

"Q. He would go ahead and purchase the materials out of money out of his own pocket?

"A. Yes, or if he didn't have it, he would probably call us up for permission to charge it to us.

"Q. The question I am asking you is, could he put those other materials into the job without prior approval from you?

"A. Well, I wouldn't answer that question plain yes or no. Sometimes he would and sometimes he wouldn't. It depends on the nature of these added materials. If it is a small item, he feels that the customer would accept it and it would be okay with us, he probably would take it upon himself to be the judge; if he felt he would be taking a chance he [84] wouldn't be reimbursed, he would probably come back to us.

"Q. If a homeowner desired repairs done which were outside of the work order, or if the homeowner desired any work to be done which was outside the work order, would the installer contact you before performing that work? A. Usually.

"Q. Was the installer free to negotiate with the homeowner as to work outside the work order?

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"A. Yes.

"Q. Do you know of any instance where that was done? A. Yes.

"Q. Without your approval? A. Yes.

"Q. In other words, you are saying that there have been jobs where the installer has entered into a separate contract with the homeowner?

"A. Well, there have been lots of jobs where the installers have entered into subsequent contracts with the homeowner that grew out of the contact that he made when they were working on the house, yes.

"Q. And that would be without your approval or knowledge? A. Oh, sure. [85]

"Q. There wasn't any policy that those matters should be referred to you or your representatives?

"A. Only if they involved our material and our contracts.

"Q. When extra work was required to be done on a job, how was the applicator paid as to that extra work?

"A. If the work was performed on one of our contracts?

"Q. Yes.

"A. Well, he is usually paid on the basis of the request that the applicator would make. In other words, if he did work that he thought was worth \$10, he asked for \$10.

"Q. In other words, he wasn't paid by the unit price for extra work? A. No.

"Q. He was more or less paid—

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"A. No such a thing. Probably his asking price for extra work was based on the number of hours he put in, as a rule, I would imagine, but there is no set figure on that.

"Q. So the work within the work order was paid on the unit price and work outside the work order or extra work was paid by the hour?

"Mr. Roe: I object as leading.

"A. Not paid by the hour, no. [86]

"Q. (By Mr. Ewing): Didn't you just say it was based, probably, on an hourly rate?

"A. No, I didn't.

"Q. Well, what did you say?

"A. I said I thought that the applicator doing extra work would probably determine his asking price based on the number of hours he put in, but he doesn't work by the hour, as far as we are concerned.

"Q. He wasn't paid by the unit price as to the extra work?

"Mr. Roe: I object. It is leading.

"A. I don't know what you mean by unit price.

"Mr. Roe: Well, he is telling you. I submit he should ask you.

"Q. (By Mr. Ewing): As to work within the work order, didn't you say it was paid by unit price; isn't that what you call unit price? Is that what you call it?

"A. The pay on contract jobs, which is the usual thing with us, is based on piece work.

"Q. I see. Now, the pay as to the extra work,

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was that based on piece work? In other words, you didn't use the same type of pay scale as to that work which was within the work order and that work which was outside of the work order? [87]

"A. No, it is a different plan of payment for extra labor.

"Q. Will you state whether or not an installer could make changes in a contract without your approval?

"A. No, the installer can't make changes in our contract.

"Q. That applies to any type of change, is that right? A. Yes.

"Q. Could an installer do anything that you could not veto? Do you know what I mean by veto?

"A. No, I don't know what you mean by veto.

"Q. Well, in other words, you could put your arm down or hand down and say, 'You can't do that'? Could an installer do anything which you could say couldn't be done or could be done?

"Mr. Roe: Would you repeat that again?

"(Question read.)

"Mr. Roe: Could an installer do anything that you say could be done or could not be done?

"A. Yes, he can do many things that we don't have any veto power over.

"Q. (By Mr. Ewing): Will you state whether or not you provide or offer to provide workmen's compensation coverage for your installers?

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“Mr. Roe: Object. It is irrelevant. [88]

“Mr. Ewing: Just one of the elements.

“Mr. Roe: Go ahead and answer.

“A. I don’t know.

“Q. (By Mr. Ewing): Did you provide workmen’s comp. for your installers?

“A. That I don’t know.

“Q. Who would know?

“A. The office manager would know.

“Q. After a job was completed, was it necessary for the installer to get a completion slip from the homeowner?

“A. By necessary, what do you mean? Did we require him to do it?

“Q. When an installer finished a job, was it necessary for him to get any type of clearance from the homeowner signifying that the homeowner was satisfied with the work for your records?

“A. Yes, it was necessary.

“Q. Pardon?

“A. It was necessary, but it wasn’t required.

“Q. In other words, you wouldn’t issue another work order to an installer until he received a completion slip from the homeowner?

“A. Oh, yes, we would, and we did.

“Q. An installer could start out on another work order? [89] A. Yes.

“Q. Was it necessary before that installer was paid to get a completion slip? A. No, no.

“Q. Well, was the completion slip necessary on each job?

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"A. It was necessary, but it wasn't required.

"Q. And what did that slip signify?

"A. Completion slip?

"Q. Yes.

"A. It signified the work was done.

"Q. Did it signify it was done in a satisfactory manner?

"A. Well, not necessarily. It signified the customer signed a piece of paper that states that the work is done in a satisfactory manner.

"Q. Have there been instances within your knowledge when the homeowner didn't sign the slip? A. Yes.

"Q. What would be done then?

"A. What would be done with the installer?

"Q. Yes.

"A. We would pay him off and give him another job.

"Q. Well, if the homeowner didn't sign the slip, would somebody from your office go out and ask why? [90]

"A. Yes, surely. Usually, the salesman went back to get it, mostly by prearrangement.

"Q. If something further was necessary to be done, another installer would come in and finish the job up?

"A. No, no, we sent back the same installer, if he was available.

"Q. And he finished the job up?

"A. Uh-huh.

"Q. If he wasn't available, somebody else would

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come and finish it? A. Surely.

"Q. Do you know of your own knowledge whether any of these installers have ever held themselves out to the public as being installers?

"A. Yes.

"Q. You mean they have advertised in the paper?

"A. Are you asking me if they advertised?

"Q. Yes. A. I don't know that.

"Q. What is the basis of your 'yes' answer?

"A. Most of the application work goes through companies like ourselves, and when you said did he hold himself up to the public as being an applicator available, why, yes, he did. He made his skills [91] known to competitors of ours and took their jobs.

"Q. So far as you know, they never advertised the fact other than just going to those people?

"A. I don't know whether they have or haven't, one way or the other.

"Q. Did you ever advertise on a job? Did you ever have a sign out on the lawn advertising?

"A. Yes, we have done it, yes.

"Q. Did the applicator ever have a sign out there advertising that he was an applicator?

"A. I don't know of any, no.

"Q. You have never seen any instances where that has happened? A. No.

"Q. Can you tell me who your witnesses are going to be in this case?

"A. (No response.)

"Mr. Roe: Tell him, if you know.

(Deposition of Milton L. Lee.)

"A. I don't. Is this still on the record?

"Mr. Ewing: Yes.

"Mr. Roe: Yes.

"Q. (By Mr. Ewing): Your answer is you don't know? A. I don't know.

"Q. Do you know approximately how many applicators were working for you between 1955 and 1958? [92]

"A. Total number in the two companies?

"Q. Right.

"A. I don't know, but I would estimate.

"Q. Approximately how many? A. 30.

"Q. Was this seasonal work?

"A. I don't know what you mean by seasonal.

"Q. Did you work in the wintertime, too?

"A. Yes. We have work every season, but there is more in some seasons than others.

"Q. But the winter wouldn't prevent you from doing this type of work? A. No.

"Mr. Ewing: I believe that is all. [93]

* * *

MILTON L. LEE

Redirect Examination

By Mr. Lyman:

Q. You recall that counsel was reading certain questions and answers to you that you made on your deposition relative to the term "contract employee," do you recall that just now? A. Yes.

(Testimony of Milton L. Lee.)

Q. Now, when you answered that question, the question was:

"Q. Will you state whether or not you felt that you could move the installers around from one job to another at your discretion?"

Do you recall that question? A. Yes.

Q. Do you recall making this answer:

"A. Well, the applicators and installers with us have always been considered to be contract employees." [94]

A. Yes.

Q. Would you tell us what you mean by "contract employees"?

A. I mean subcontractors.

Q. And then do you remember this question:

"Q. If you can state whether or not you felt you could move one installer from one job to another at your discretion?

"A. I don't feel that way and I never have, no."

Do you remember that answer?

A. Yes, sir.

Q. Do you remember this question:

"Q. As a matter of fact, you did move them when somebody called, say, on one job and said, 'I've got storm windows I've got to get up,' and this particular applicator was working on another job, you could call him and send him to that other job, could you not?"

Do you remember this question?

A. Yes.

Q. Do you remember this answer:

(Testimony of Milton L. Lee.)

"A. Well, only if he is willing to go."

A. Yes.

Q. Now, do you recall during this period, if you have any [95] recollection of your own, while you were there or during this period, whether or not the unit prices for windows and for siding were changed as a result of conferences between you and the applicators? A. Yes, they were.

Q. And how did that come about, if you know, who started it off?

A. It started off by the applicators approaching me to have such a meeting and discuss the prices.

Q. And did the prices go up as a result of that meeting? A. They did.

Q. Now, there was some question raised about the company loaning out tools. How often would you loan an applicator or an installer a tool?

A. Very, very seldom.

Q. And what sort of thing would it be?

A. It might be an extension ladder, a 40-foot extension ladder, or staging, or possibly if you had an extremely large unit you might loan him a truck to haul it out.

Q. That would be on a rare occasion?

A. Yes.

Q. Ordinarily the men had their own tools and their own equipment and their own trucks, isn't that true? A. Right, sir.

Q. Now, was there any different rate that the men demanded [96] or negotiated for a job that was higher than the first floor? A. Yes.

(Testimony of Milton L. Lee.)

Q. And how did that come about, if you know?

A. More or less the same way, they would just say, "I can't make any money on this kind of basis, I have got to have a better deal," so we would negotiate a better rate.

Q. And if the job was some distance away from the metropolitan center or the city center, would that have any effect on the amount the man would get?

A. Yes, the rates changed for that, too.

Q. Now, who would pay expenses for these installers, many of them had to stay overnight, isn't that so? A. Yes.

Q. And they would go away for periods at a time? A. Yes.

Q. And who would pay their expenses?

A. They paid their own.

Q. It would come out of the gross amount of their earnings? A. That is right.

Q. Now, I believe the question was answered or asked, "Do you have power to discharge a man for bad performance," do you recall the question by Mr. Ewing? A. Yes. [97]

Q. Well, I will ask you this question: If a man is not performing in a workmanlike manner and is not in keeping with the time of the customer, isn't that the time that you would exercise that power?

A. Yes.

Q. What was your interest in the performance of a job, what did you look for?

A. Our interest is in a complete performance of

(Testimony of Milton L. Lee.)

the work on a job. In other words, we gave a man a work order and said, "Do the job, bring it in complete," and then our interest was in the complete performance of the work on the job.

Q. Now, when a man would go out, what interest, if any, did you have in the manner or the method in which he went about the job?

A. We had no interest in that.

Q. Now, did you ever tell a man which side of the house to start on, for instance? A. No.

Q. Or which windows to put up first?

A. No.

Q. Or which door to put on? A. No.

Q. Who decided those details?

A. He decided those details for himself. [98]

Q. Now, when a customer would complain, you would usually have somebody from the shop or yourself would go out, isn't that correct?

A. Usually from the shop.

Q. Yes. Now, was that Mr. Williams, as a rule?

A. I think so.

Q. Now, what was his function?

A. Well, he was the manager of the production department and, as such, he passed out the work orders to the installers and applicators, too.

Q. Then he would go out on his customer complaint? A. Yes.

Q. All right. Now, did he ever—

A. (Interposing): Not always; I mean, he went out on some of them.

(Testimony of Milton L. Lee.)

Q. Now, did he ever direct or show a man the details of how to perform his work on the job?

A. I can't say that.

Q. I see, all right. Now, counsel asked you several questions about leaving one job to go to another; when those things happened, whose job would a man leave to go to?

A. He would usually leave one of his own jobs to go to another of his own jobs. In other words, if he had a load of windows, he would have several work orders, in other words, if the occasion occasioned, he might [99] leave and go on to another job and then come back to the first one.

Q. Did these installers occasionally have more than one job going at the same time?

A. Yes, they frequently did.

Q. Did you ever have a situation when you would tell one man to go to work on another man's job and compel him to divide up the profit?

A. I have no knowledge of such a situation.

Q. Has it ever happened?

A. Not to my knowledge.

Q. Now, I believe counsel asked you, "Can't these jobs be done without somebody standing over and supervising," do you recall that question?

A. Yes.

Q. Isn't it a fact that you rely upon the experience of these men to do a satisfactory job in accordance with the contract? A. Entirely.

Q. And it is this reliance that has caused you to dispense with supervisors, isn't that true?

(Testimony of Milton L. Lee.)

A. Yes. When you say "dispense," we never had supervisors.

Q. Well, I mean in the nature of the business that supervisors are not required, so you have never had the necessity for it? [100]

A. That is right.

Q. Now, I believe you answered questions on direct examination to the effect that there were no written agreements between the applicators and the company? A. That is correct.

Q. Now, I believe you were also, just to refresh your recollection, that other than the writing on the work orders which you identified, there were no other written directions or instructions as to how to do the job? A. Specific job?

Q. Yes. A. No.

Q. Now, counsel has asked you if there were bulletins of some kind; what were the nature of these bulletins, what was their purpose?

A. Well, the purpose of the bulletins would be to lay out the general specifications of a good job; for instance, a suggested approach to do satisfactory work.

Q. Well, they were suggestive of an approach to a job?

A. Well, they were not signed contracts.

Mr. Lyman: No. I believe that is all, your Honor.

The Court: Mr. Ewing?

(Testimony of Milton L. Lee.)

Recross-Examination

By Mr. Ewing:

Q. In reference to this moving installers around from one [101] job to another, I believe you stated that he would go only if he was willing to go, is that correct? A. Yes.

Q. Referring to the deposition again, page 27, line 16:

"Q. As a matter of fact, you did move them when somebody called, say, on one job and said, 'I've got storm windows I've got to get up,' and this particular applicator was working on another job, you would call him and send him to that other job, could you not?

"A. Well, only if he is willing to go.

"Q. But you would ask him to go, wouldn't you? A. I sure would.

"Q. What if he didn't go?

"A. You mean what would I do if he didn't go?

"Q. Yes. A. I don't know. I don't know."

Q. (By Mr. Ewing): Does that sound about right? A. Yes.

Q. Some of these installers had out of town jobs, did they not? A. Yes.

Q. And assuming that you had a job in Yakima for an installer and you wanted him to stop at some point along the [102] way to Yakima to do another job, say in Pasco, now at that intermediate point at that job which that installer would do in Pasco,

(Testimony of Milton L. Lee.)

wasn't he paid by the hour on that job, his final destination being Yakima? In other words, he is going to do a job in Yakima, but there is another job that you asked him to do on the way, which we will say is in Pasco, his final destination is Yakima, isn't it true that as to that job in Pasco he would be paid by the hour for that job?

A. No, not if it is a regular installation job he wouldn't.

Q. And that has never happened that you know of?

A. Well, I am not aware of any hourly work having been done on that kind of a job, no. Now, if it is a matter of a complaint, or something like that, it could be, but you are talking about a job.

Q. Yes, a regular job. A. A regular job?

Q. You don't know of anything like that?

A. I don't know of any.

Q. You stated that supervisors are not required, is that correct? A. Required?

Q. Supervisors are not required in this type of work? A. Not in our business.

Q. Yet you will recall in the deposition when I asked you [103] if you had been out on a job and if you had given suggestions and directions before, you stated you have, do you recall that? A. Yes.

Q. And I believe you stated in your deposition that salesmen are supposed to go out and look at these jobs? A. Yes.

Q. And isn't it true that the production manager, Mr. Williams, goes out and looks at these jobs now

(Testimony of Milton L. Lee.)

and then? A. He has done it.

Q. And hasn't Mr. McFarlane gone out and looked at these jobs? A. Yes.

Q. Who is Mr. McFarlane?

A. Well, he was the manager of the company prior to the time I came here.

Q. So even though there was nobody looking over this person's shoulder, the installer's shoulder, to every detail on the job, there were people going out and checking that work, were there not?

A. Every job?

Q. Well, not every job, I won't say every job.

A. There were people who check a few jobs, yes.

Q. Just a few? A. Yes. [104]

Mr. Ewing: That is all I have.

Redirect Examination

By Mr. Lyman:

Q. With regard to the last matter, when a salesman or Mr. Williams or Mr. McFarlane or yourself, you went out to look at a job or its progress, your interest, was it not, was to see that it conformed with the contract to the customer?

A. That is correct.

Q. Did you have any interest in which side of the house he began on? A. No.

Q. Or how he was going about doing the job?

A. No.

Mr. Lyman: That is all, your Honor.

The Court: I have a few questions: What is your residence, Mr. Lee?

(Testimony of Milton L. Lee.)

A. W. 3236 Houston, Spokane, Washington.

The Court: I thought you were living in Salt Lake City?

A. I lived in Salt Lake City until 1958.

The Court: Is Alesco Storm Windows a Washington corporation? A. Yes.

The Court: It isn't so alleged in the [105] complaint. Is Alesco Northwest a Washington corporation?

A. It is, yes, sir.

The Court: Where were these returns filed that are involved here?

A. I think they were all filed in Tacoma, sir.

The Court: Now, your company, these two companies, had liability insurance, did they?

A. General liability, sir.

The Court: Yes.

A. Yes.

The Court: Was it a blanket liability policy?

A. General liability, yes, your Honor.

The Court: Who, in your organization, had charge of the liability insurance coverage?

A. Who is responsible for getting the contracts written?

The Court: Yes.

A. Those contracts were supervised by Mr. McFarlane.

The Court: Who is he?

A. He was the manager before I came.

The Court: Well, what about after you came?

A. Well, they were in force.

(Testimony of Milton L. Lee.)

The Court: Well, you don't have a continuous policy, do you? Don't you renew it annually?

A. Yes, sir, but the policy is the same.

The Court: Have you ever read the policy? [106]

A. Well, I think I am familiar with it, yes, sir.

The Court: Well, does it cover the operations of these installers and applicators?

A. Yes, sir.

The Court: Have you ever been sued by a customer because of any tortious act committed by an applicator or installer? A. I don't think so.

The Court: Have you ever been sued?

A. Yes, sir.

The Court: For any tort liability? Do you know what I mean by "tort," any wrongful act, such as an automobile accident, or something like that?

A. No, sir, I don't think we have.

The Court: Where is the bulletin that you issued to these applicators or installers?

Mr. Ewing: May I answer that?

The Court: I was asking him.

Mr. Ewing: Well, I know.

The Court: Let me ask him, where is it?

A. We no longer use it, sir.

The Court: Have you got a copy here?

A. We couldn't get a copy.

The Court: You have got a lot of applicators, they must have some copies. [107]

A. Well, I understand that the defense has a copy.

(Testimony of Milton L. Lee.)

The Court: Do you have a copy, Mr. Ewing?

Mr. Ewing: Yes, I do.

The Court: All right. You talked about the unit price that you paid these applicators, what was the unit price?

A. In the storm window and door business it's based on windows, so much a window, so much a door.

The Court: It doesn't have anything to do with the size of the windows?

A. Not as much as the type of windows, sir.

The Court: What about the siding or roofing, is that by squares?

A. Siding and roofing is, generally speaking, based on so much per square.

The Court: When you say "generally speaking," that must mean that you must make a different rule for each case?

A. Well, there are certain parts of a siding job that you don't base on a square.

The Court: I see. Then you must have to make a different contract for each particular job, is that right?

A. It amounts to that, if the job involves different particular specifications.

The Court: Now, you stated on your [108] direct examination, as I recall, in answer to a question as to whether or not you removed men from the job if the installer and applicator did not perform correctly, that you would remove them from the job for unsatisfactory workmanship and you

(Testimony of Milton L. Lee.)

might sever your connection because of "lack of work to keep him busy," did you do that?

A. Yes.

The Court: Under what circumstances would you sever your connection with an applicator because of lack of work to keep him busy?

A. We had no work order to pass out to him so he had no job.

The Court: Well, you must have had some kind of an arrangement as to where you were going to find these men. Did you have them call at your office to report for work? How did they know when the work order was available?

A. Well, they sometimes called us. We frequently called them. The fellows are aware of the seasonal adjustment in our business, they sort of keep in touch.

The Court: Now, there might be times, then, when you would furnish enough work to keep an applicator busy continuously?

A. Yes, sir, we have had several applicators that have worked for several years.

The Court: For you and nobody else? [109]

A. Yes, sir.

The Court: Did you ever have a repeat business where these men go out and do work on the job?

A. I don't quite follow you, on the same job?

The Court: Yes.

A. Yes, sir.

The Court: You may have a contract with Mrs.

(Testimony of Milton L. Lee.)

John Doe for 1957, do you ever have a contract with her, for example, in 1960?

A. Yes, sir.

The Court: Now, you talked about the pad of work orders and purchase orders being the same and one a carbon of the other, do you have a pad of those work orders here?

A. No, sir.

The Court: You just give us the pink copy, what is that?

A. That is the copy we generally used for a work order.

The Court: I see. Well, what color are the others?

A. The original copy is white, the second copy is pink, and the third copy is yellow and the fourth copy is goldenrod, as I remember, sir.

The Court: And the customer, who keeps the fourth copy?

A. Well, to run through the series, this is about the way [110] they are handled: We keep a copy in the office, which is a file copy. We give a copy to the factory, which is the work order to the applicator. We usually send a copy to the dealer and salesman that turned it in, that is three. The fourth copy is a shop copy, which is used to manufacture the windows and it is filed in our factory.

The Court: Well, now, are they all printed differently?

A. No, it's the same form, different colored sheets.

(Testimony of Milton L. Lee.)

The Court: Does it say the same thing at the top and the bottom?

A. They are carbon copies.

The Court: Your contracts are signed by your representative salesmen, aren't they?

A. Yes.

The Court: And the purchase orders are signed by the same salesman?

A. He usually makes them out. The work order in the window business is generally made out by the man who measures the windows.

The Court: Who is that?

A. And that has generally been the salesman.

The Court: The purchase order has this notation: "Recheck all measurements. Positively no returns. Write [111] each order in quadruplicate. Mail original and duplicate to Alesco, Inc., Spokane 62, Washington. Retain duplicate in your files." Who are they referring to when they say "your files"?

A. The dealer.

The Court: Who is the dealer?

A. Well, the dealer might be an independent account, a dealer.

The Court: I will ask you to look at Exhibits 5 and 6, the dealer's name appears to be the customer who made the purchase. Does he keep the quadruplicate?

A. Well, sir, in this particular case of 6, the dealer's name was not written on it originally. They apparently had difficulty reading the customer's

(Testimony of Milton L. Lee.)

name, so they printed it on the left side, but the customer is not the dealer, no, sir, in this case.

The Court: You say that all these forms are always the same?

A. The purchase order and the work order, sir?

The Court: Yes.

A. Yes, sir, that is pretty generally the situation.

The Court: I will ask you to look at Exhibits 4 and 8 and compare them. They are not the same, are they (hands papers to witness)?

A. Well, no, sir. The difference is that this calls for [112] a specific type of window and in this case it's a door. We use different forms for different types of products.

The Court: Then you had different forms of purchase orders and work orders, didn't you.

A. Yes, sir.

The Court: Well, how many different forms did you have?

A. Well, I think we had two window and door forms, and a siding form; that would be three.

The Court: But these then are not, you don't have all of them here, then, do you?

A. I don't think we have any siding form, no, sir.

The Court: Weren't any of these purchase orders or work orders used by you that gave information as to where on the house the work was to be done?

A. The indication would be made by the number of the unit.

(Testimony of Milton L. Lee.)

The Court: Well, what does that have to do with it?

A. Well, we have a system of measuring the openings on a house, of numbering them, so when they are measured, why, we number them, and when a fellow goes out to put them on he knows where each unit goes.

The Court: Well, is that on the purchase order?

A. Yes, sir; it should be. In other words, Window No. 1 is a specific opening on a house. [113]

The Court: All right, that is all I have.

Mr. Lyman: If the Court please, I just want to make one objection, if I may.

The Court: To my questions? You certainly may. Do you want to move to strike it?

Mr. Lyman: I hesitated, but I have got to do it. The Court queried the witness on the question of liability insurance and I want to move an objection to the question as being immaterial in this type of case for the reason that for the purpose of a definition of employee under this particular statute the definition of employee in a particular state would have no relevance.

The Court: Would have no what?

Mr. Lyman: Would have no relevance. I refer to a case, a classic case, I think it's the 7th Circuit, Dimmett, and others.

The Court: Is it cited in your brief?

Mr. Lyman: No, your Honor.

The Court: I think you are correct about that. That is true, that the employee-employer relation-

(Testimony of Milton L. Lee.)

ship under the particular state law would not control as to the federal law, and the interpretations under the federal statutes, but, however, I had another question on the insurance matter and you don't have to answer this if you don't want to.

Mr. Lyman: I wouldn't know the answer. [114]

* * *

The Court: And so I think probably the question as to the interpretation of the liability policy would be immaterial because those other matters aren't controlling now, either. By that I mean the admissions at that time that they made when they withheld the tax and paid it over would not be controlling here, so if you want to make a motion to strike that part of the testimony on the grounds that my question is immaterial, I will grant your motion.

Mr. Lyman: Yes, your Honor.

The Court: All right.

Mr. Lyman: Thank you.

The Court: That is all, Mr. Lee.

(Witness excused.)

RALPH E. WILLIAMS,

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

The Clerk: Please state your name to the Court, please?

A. Ralph E. Williams.

The Clerk: Thank you, please be seated.

Mr. Ewing: I didn't catch that.

The Clerk: Ralph E. Williams. [116]

Mr. Lyman: Your Honor, we will endeavor not to be repetitious since it would serve no purpose.

Direct Examination

By Mr. Lyman:

Q. Mr. Williams, what is your present address?

A. N. 1502 Lewis, Spokane.

Q. Spokane? And what is your present occupation?

A. Production manager for Alsco Northwest, Inc.

Q. When did you first come with Alsco Northwest? A. 1948.

Q. And how long have you been with the Spokane branch? A. Continuously.

Q. From 1948? A. That is right.

Q. All right, sir. Now, will you tell us how you go about getting applicators to do this work?

A. Well, some by reference, by newspaper ads, by telephone, and some, when we first started, we broke them in from just green help.

(Testimony of Ralph E. Williams.)

Q. Now, in 1954 to '58, the period with which we are concerned, the men who were performing the service then were experienced in this work, were they not? A. Most generally, yes.

Q. Now, may I have the work order, sir? I will show you Plaintiffs' Exhibits 2, 4, 6 and 8, and they are the [117] work orders, are they not, that you give the applicators when they go out on these jobs (hands papers to witness)?

A. That is right, we give them normally the pink copy.

Q. You give them normally the pink copy?

A. Normally, yes.

Q. Now, just so I get my colors straight, would Exhibits 2 and 4, which are not pink copies, would they be carbon copies of the pink copy which is in the file?

A. That is right, they are all in the same boat.

Q. In other words, I took the wrong one?

A. That is right. These are the copy that would go to the installer.

Q. But the information on Exhibits 2 and 4 would be the same on the pink copies?

A. Yes.

The Court: How about the printed matter?

Q. (By Mr. Lyman): How about the printed matter, would that be the same?

A. The printed matter would be the same unless it was a different type of windows, there would be four copies of this, and four of this (indicating).

Q. When you say different type windows, you

(Testimony of Ralph E. Williams.)

are referring to Plaintiffs' 8, but all of the colors of the various forms would have the same printed matter on it? [118]

A. The same thing, exactly.

Q. All right. Now then, I will ask you to look at the reverse side of each of the Exhibits 2, 4, 6 and 8, and tell us what is the purpose of the figuring on the reverse side?

A. Well, that is their pay scale, different type windows had a different price.

Mr. Lyman: Your Honor, I am not familiar with your procedure. May I stand here?

The Court: All right.

Q. (By Mr. Lyman): Now, for instance, we are looking at Plaintiffs' 8 in evidence, and there is certain writing on there, and what, essentially, is that writing, what does it mean?

A. The installer would write in there the number of windows and the price, and I would okay it, whether it would be paid or not, so the bookkeeper would know it was okay.

Q. All right. Now, based upon the computation on the rear side of the work order, that would comprise the pay, would it not, of an installer-applicator? A. Yes.

Q. And his pay was based upon each of these individual jobs? A. That is right.

Q. And each job was a separate [119] undertaking? A. That is right.

Q. Now, I notice in Plaintiffs' 6 in evidence, there are similar figures and there is some writing

(Testimony of Ralph E. Williams.)

"Extra labor for taking off plexiglass and stripping and one old screen door, \$3.50." Now, what does that mean?

A. That means that he has entered into it with the customer to take that old stuff off before he puts that new on. We assume when they sold the windows there was a place for the window, and so that would be charged back to the job.

Q. All right. Now, he has the figure "\$3.50" at the top of that computation, and then I am pointing to a line which says, "Charge extra labor \$3.50." A. That is right.

Q. Is that correct? Now, is there any indication there about hours of any kind?

A. No, no, just a specific amount of the job that he has done for the contract.

Q. Now, who decided that he gets \$3.50, who arrived at that figure \$3.50?

A. In this instance it was Gene, my foreman.

Q. Now, did the company arrive at \$3.50 or does the man suggest the \$3.50?

A. That is arbitrary with the salesman who sold the job. In other words, they check back with him and they [120] generally authorize that extra payment.

Q. In other words, the salesman who authorizes the extra payment, and it would come out of his commission? A. That is right.

Q. All right, sir. Now, on Plaintiffs' 4 you have a similar computation in this block, and there is a

(Testimony of Ralph E. Williams.)

note, notation, "Pay Dean Minton \$3.00," what is the significance of that?

A. Well, this was an out-of-town job performed in Portland by I presume the installer Mr. Minton has okayed to pay Dean Minton, maybe his son, that out of his part of the contract.

Q. In other words, Dean Minton would be his helper? A. That is right.

Q. And he was directing the company to pay part of his gross proceeds to the helper?

A. That is right. In other words, making out one check to him, possibly, and one to him, and he is directing that they do that.

Q. All right, sir. Now, I will show you Plaintiffs' 2 in evidence. It has a block for computation, and I notice under the word "Other" it has "\$8.00," what is that, if you know?

A. That would have been extra labor.

Q. And is there anything to indicate hours on there? [121] A. There is nothing.

Q. Do you know how that \$8.00 was arrived at, if you know?

A. No, it would possibly be written up on a copy by the salesman.

Q. All right. In the shop you give out a number of these orders, do you not, sometimes to a single installer? A. That is right.

Q. Now, how does that work?

A. Beg your pardon?

Q. How does that work, why do you give them a number of jobs?

(Testimony of Ralph E. Williams.)

A. Well, maybe one job will have two doors on it and it is not enough to take out, and a lot of his time will be road time, and so we give him what he thinks it would be put on to satisfy and to put more jobs on in a given length of time.

Q. Now, you said "road time." He doesn't get paid for road time, does he?

A. No. I mean it would save him, he couldn't make enough money if he took out two units at a time, so we give him a load, and he could go any place he wanted and he could route it that way, save himself the road time.

Q. Who makes up the schedule when you give out a group of jobs? A. He would. [122]

Q. He decides which house he will do first and even if he wants to do two at the same time?

A. Once in a while we have a customer who is leaving town by a certain date, or going on a vacation, and asking if it is possible to have their job put on before they leave. If they are tied up with jobs, we would get another installer, possibly, who wasn't tied up, who was available to do the job.

Q. Now, if the installers are all out working and putting up their siding and windows and you have a new job coming in which is rush, this customer absolutely must have it right away, what do you do, as foreman there?

A. Well, we check and see who would be the most available and ask him if they could spare the time to do the job. If they said "no" then we

(Testimony of Ralph E. Williams.)

would have to shop around and get another one who would be available.

Q. Then that would be his job, though?

A. That is right.

Mr. Ewing: Just to clarify it a little bit here, you say the person who would be the most available, do you mean some installer who would not be working on a job at that time?

A. Either that or if they all had jobs out, it would just be the one who could get off a job. Maybe it was a [123] mistake on the part of an order, maybe a couple of windows or doors. While that was being made up, he would go out and put the job on, but you wouldn't pull a man off a job to come in and do another job.

Q. (By Mr. Lyman): Now, other than these work orders which you have seen and identified, are there any other directions or instructions that you give a man how to do the work?

A. Only when we put an ad in the paper and maybe get some new installers.

Q. No, I say are there any other instructions other than what is on here, to an installer as to how to do the work? A. No, oh, no.

Q. You don't have supervisors that go out and direct them, is that correct? A. That is right.

Q. And when you do go out, what is your purpose when you go out to look at a job, what do you look for?

A. Well, I either ask for an opinion on them——

(Testimony of Ralph E. Williams.)

Q. (Interposing): Do you understand my question? A. Beg your pardon?

Q. Do you understand my question?

A. Maybe I didn't.

Q. Do you ever go out on a job to see the progress? [124] A. No.

Q. Oh, you haven't?

A. No, not to see how, no.

Q. Is there anyone from the shop that might go out? A. No one.

Mr. Ewing: Excuse me, what was the answer?

(Last answer read.)

Q. (By Mr. Lyman): Now, these applicators, do you know whether they hire helpers; I mean, do you have that knowledge?

A. Occasionally I would, a lot of times I wouldn't.

Q. But they do hire help? A. They do.

Q. And the company doesn't interfere in any way with those helpers? A. Not a bit.

Q. And the pay and the working conditions of those helpers are determined solely by the applicator? A. That is right.

Q. Now, you have sometimes a rush of business and then sometimes it falls off, is that correct, during the particular year? A. Yes.

Q. Now, in the Spokane office about how many men would you have at your peak time? [125]

A. Well, we would have about eight to ten men.

(Testimony of Ralph E. Williams.)

Q. And your slowest time, how many would you have? A. Two or three.

Q. And usually who would those be, if you know?

A. Well, it would be the same men, at that period it was Don Lewis and George Aronson, would be the two.

Q. Yes. Now, did these other men who worked for Alsco from time to time, did they work for other companies performing similar businesses in this area? A. Some of them, yes.

Q. And would they then come back to Alsco and do work for Alsco? A. Yes.

Mr. Lyman: I believe that is all, your Honor, it would be repetitive to go into anything else.

Q. Oh, let me ask this: These applicators or installers with whom you work, are you familiar with the tools they have? A. More or less, yes.

Q. Could you give us an estimate of what the investment or the cost they have to acquire these tools; or, put it this way: If they lost them suddenly, what would the replacement cost be?

A. Well, some of them have a portable power saw and hand tools, and then their own trucks; it could be—I [126] wouldn't have any idea—each one would be a little different investment. Some of them have more elaborate tools than others.

Q. Well, could you give an estimate, just so we have an idea?

A. Well, on the hand tools and saw, I imagine \$100, \$150.

(Testimony of Ralph E. Williams.)

Q. And what would the complete investment of a rig, truck and tools be for an average applicator, from your experience?

A. Well, it could be \$2500 for the truck, and so forth.

Mr. Lyman: Yes.

Cross-Examination

By Mr. Ewing:

Q. Mr. Williams, I understand you have worked for Alesco here in Spokane since 1948, is that right?

A. Yes, sir.

Q. And what is the title of your job?

A. Well, I am in charge of production.

Q. In charge of production?

A. That is right.

Q. And how long have you held that job?

A. Since 1948.

Q. Will you describe the duties of that job, please, briefly? [127]

A. Well, I hire the people in the shop, supervise the shop employees, lay out the orders to fit the different windows on the orders that come in, purchase the material, and at that time when we had installers I was in charge of the installers, installation.

Q. Do you hire installers, is that part of your job? A. I did, yes.

Q. Likewise, do you discharge installers?

A. Yes, sir.

(Testimony of Ralph E. Williams.)

Q. As to extra work on these jobs, what is the pay basis for extra work?

A. That varied in different, within different times, normally the extra labor would be for blind stopping.

Q. What is the pay basis, is it paid by unit, piecemeal? A. No, it would be by the job.

Q. What do you mean "by the job"?

A. Well, if they had one things other than put on the windows it may be a number of hours, I imagine they would put it in on the labor contract.

Q. As to extra work, then, they are paid by the hour; is that correct?

A. Well, on the basis of that.

Q. Well, if the person has done three hours extra labor he has been paid a certain amount per hour for that job and I suppose it's three times that certain amount, is [128] that it?

A. That would be it, yes.

Q. So he is paid by the hour, is he not?

A. He is paid by the hour.

Q. Did I understand you to say as to this extra payment that would in some cases be due an installer for doing the extra work the salesman would authorize the extra payment and it would come out of his commission money?

A. Yes, sir, that is right, because he had contracted the job for so much and that would be it.

Q. This extra work money would not come out

A. I wouldn't be so sure on that because I am of Alsco funds?

(Testimony of Ralph E. Williams.)
in charge of production and I am not always sure.

Q. Isn't it true that extra work had to be approved by your office? A. Yes.

Q. So if you approved it, I would assume that you pay it, don't you? A. At that time, yes.

Q. When you had work to be done, how were these installers notified, again?

A. Well, generally, by, they would come into the plant ready for more work.

Q. As to your regular installers, did they need to be notified at all, wouldn't they just [129] come in?

A. Not, normally when they got the order they had out, they would come in for more work.

Q. Now, isn't it true that when work orders—well, I will ask you this first: Isn't it true that at times an installer was given as many as, say, eight or nine work orders at one time?

A. It could possibly be, yes.

Q. And isn't it true that when you gave those work orders to him you told him which job was to be done first, second, and so forth, you established the priority?

A. No, not unless there was maybe a priority on one job, they regulated their own jobs.

Q. If there was a job, you told him to do that job first?

A. No, if it was reasonable, if he could do it, we told him to get someone else.

Q. Pardon?

(Testimony of Ralph E. Williams.)

A. If it was reasonable for him to do it, if he could possibly do it.

Q. Well, if you gave an installer four or five orders any one of which he could start with, but you had a job that should be done right away, wouldn't you tell him to do this job first?

A. I would ask if he could, and if he said he couldn't, I would take the job back, the work order back, and give it to someone else. [130]

Q. Was there any agreement between Alsco, the company you represent, and the installers, in writing, outside of what may be included in the work order?

A. No, other than to outline in a bulletin the amount we pay for each window, each type window, each size, I mean, if there was a size differential and extra labor, what I mean is, if they went out on a 15-mile radius from town, they would get more per unit.

Q. The only written evidence of any agreement between you two, that is, between the installer and Alsco, would be the work order and these bulletins?

A. That is right, and the bulletin was just a bulletin that we gave any employee that came in, any installer, mostly for new installers.

Q. Were any pay negotiations entered into at the time the job was, an installer picked up a work order? A. No.

Q. Who made the final determination as to what the price would be that would be paid to an installer?

(Testimony of Ralph E. Williams.)

A. Well, if there was any, if it wasn't according to the regular run or trend of prices that we had given them, it would be up to the manager, Mr. McFarlane.

Q. Do you have any knowledge of, say, you give a man two orders, one to do in Pasco and one to do in Yakima, Yakima being it's final destination point, do you know [131] of any jobs where a man when he stopped to do the Pasco job he would be paid by the hour for that job?

A. Not unless it would be a service job, or something like that.

Q. What do you mean, "a service job"?

A. Well, a complaint.

Q. He would just be redoing some other job?

A. That is right.

Q. You would never be negotiating a new job and he would be paid by the hour? A. No.

Q. Were these installers free to accept or reject a work order that was offered them?

A. They were, occasionally they did.

Q. Do you know of any instances where an installer did not accept a work order?

A. Yes, when maybe they would find another job and refuse to take a job that was offered them.

Q. You mean they would start working for somebody else? A. That is right.

Q. Well, if they start working for somebody else, they wouldn't be in to see you, would they?

A. Sometimes they would have a job before they came back in to see me. I would hand them a work

(Testimony of Ralph E. Williams.)

order and they would say, "I don't want to go there." And I would say, [132] "I don't have anything else for you right now."

Q. If somebody came in and you said, "I don't have any jobs for you now," would you refer them to any competitors?

A. Yes, I would. I mean, I might do that if it would help the boy.

Q. Did your company have any policy at all as to these installers working for other people?

A. No.

Q. And that applies to your regular installers, too?

A. It applies to all installers, because we couldn't keep them busy all the time, we shouldn't deprive them of doing work for somebody else if we didn't have jobs for them.

Q. As to these helpers, sometimes I think you stated that an applicator does hire a helper to help him? A. Occasionally.

Q. Who keeps the pay records of the helper?

A. The applicator, the installer.

Q. Has Alsco ever kept any records for the helper? A. Not to my knowledge.

Q. Well, isn't there on one of these exhibits that you testified to on direct examination, didn't you say that this fellow Minton, on the work order, Minton was the helper? [133]

A. Could I see the order, please?

Q. And he was directing you to pay the [134] helper?

RALPH E. WILLIAMS

recalled as a witness on behalf of the plaintiffs, resumed the stand and testified further as follows:

Cross-Examination
(Continued)

By Mr. Ewing:

Q. Mr. Williams, is Alesco now, at the present time, operating in substantially the same manner that they operated during the period 1954 to 1958?

A. No, we are wholesale, the department I am in now, only.

Q. Do they have installers?

A. I have no installers, no.

Q. Do installers work for Alesco at all, that you know of?

A. They put on doors once in a while on contract jobs, yes.

Q. Who does Mr. McFarlane work for now?

A. I think he is with a company of his own, AllState.

Q. Who furnished the materials that went into any particular job, any job in general? [135]

A. If it was Alesco window material, we furnished the material.

Q. And did you deliver them to the job site?

A. On occasion we have, where they weren't equipped to haul, we have delivered.

Q. And the other times the installer would pick them up at Alesco and take them out to the job himself?

(Testimony of Ralph E. Williams.)

A. We only deliver to assist the installer, the contractor.

Q. Was anything else furnished by Alsco other than material? A. Not that I know of.

Q. Ladders, or anything like that?

A. We have loaned ladders, yes, we have loaned maybe a tool that wouldn't be a common tool to an installer.

Q. How about it, do you own any trucks, did Alsco own any pickup trucks?

A. We have had pickup trucks, yes.

Q. Were those used by installers at all?

A. They were just used for on delivery.

Q. You don't know of any instance where an installer used Alsco's own trucks?

A. In what period are you talking of, the very inception?

Q. Well, say the period between 1954 and 1958?

A. Oh, if one of their rigs broke down, we might have loaned them one, it would just be for the trip. [136]

Q. I believe you stated on direct examination that nobody went out and checked these jobs, was that your answer? A. Not normally, no.

Q. Were salesmen supposed to check these jobs?

A. No, the salesman generally doesn't know enough about the job to inspect the job.

Q. Did you hear Mr. Lee testify this morning through his deposition, which he admitted was true, that salesmen were supposed to check these jobs?

A. They do on occasion, but I didn't know that

(Testimony of Ralph E. Williams.)
they were supposed to, not from my department,
they were not supposed to.

Q. You don't know of your own knowledge
whether, in fact, they have checked jobs in the past?

A. No, I wouldn't know, because I am with pro-
duction and not the sales.

Q. Did you hear Mr. Lee testify this morning
that he has been out on jobs and has given direc-
tions and suggestions on occasion?

A. I heard his statements this morning.

Q. How does that coincide with your statement
that nobody went out and looked at these jobs?

A. Nobody went out to inspect the jobs from
my department.

Q. What is your department?

A. Production and installation. [137]

Q. With reference to, I believe you stated you
do the hiring, or you did do the hiring?

A. Yes, I did do the hiring.

Q. And on occasion you hired, I suppose, new
applicators? A. That is right.

Q. Is their work checked at all?

A. Normally, if we would get a complaint, we
would maybe go out and check a job on a complaint,
a customer's complaint.

Q. In other words, the man that you have never
known before has come in and would say he is an
installer, you would send him out to do a job and
not even check that job?

A. Sometimes we would send them out with an-
other installer, a seasoned installer.

(Testimony of Ralph E. Williams.)

Q. Sometimes you would send them out with a seasoned installer?

A. Yes, if they have had experience with other companies.

Q. Was the other installer to check their work for you?

A. No, merely to, not for us, merely to help them.

Q. The installer was working for you, though, wasn't he?

A. He wasn't working for me, he was a contractor working for himself, putting on our product.

Q. You have never been out on any of these jobs, personally? [138]

A. Yes, I have been out on jobs where there has been complaints or trouble.

Q. And what would you do if a complaint arose and you went out and checked the job, what would be the procedure then?

A. Well, I would try to see if I could withhold the contractor's pay until he had finished the job, done a job satisfactory to the customer, like he had contracted for.

Q. Did you tell the installer what needed to be done in order to complete that job?

A. If I was out on the job.

Q. You have been out on jobs on occasion, then?

A. On occasion, just where there is customer complaints.

Q. You heard Mr. Lee testify this morning that

(Testimony of Ralph E. Williams.)

he had the power to give instructions to these installers, did you have that same power?

A. I imagine I did.

Q. I believe you stated on direct that there have been times when directives or bulletins have been issued by Alesco to installers, is that correct?

A. We have made up bulletins to tell the contractors to more or less, it was how the job is to be, we would like to have the job done so it would be acceptable to the customer. [139]

Q. What was your understanding of these bulletins, what was the purpose of them?

A. The purpose of them was when we hire new men in our peak season or busy season so they would know what to do, what the job is on.

Q. Were they only given to new men?

A. Not necessarily, they were available to all of them.

Q. They were directed to all installers, isn't that correct?

A. To all installation contractors, I think it reads.

Q. And you wanted everybody to get them, didn't you, all installers, not just the new ones, isn't that true? A. Yes.

The Clerk: Marking Defendant's Identification No. 11.

Q. (By Mr. Ewing): Showing you Defendant's Identification No. 11, entitled "Important Information to All Installers and Applicators," issued by Alesco Storm Windows, Inc., apparently signed by

(Testimony of Ralph E. Williams.)

Melvin McFarlane, Manager, dated May 9, 1960 (hands paper to witness), I will show you that and ask you if you are familiar with that?

A. No, sir, I have never, I have never seen that one before.

Q. You have never seen that one before?

A. No, I didn't. [140]

Q. It's entitled "Alesco Storm Windows, Inc.," is it not? A. That is right.

Q. So it must have been issued by Alesco?

A. It could have been.

Q. You are not familiar with what is herein stated here?

A. No, because that doesn't apply to me.

Q. It does apply to applicators and installers, does it not? A. It does, yes.

Mr. Ewing: I will ask the admission of this bulletin (shows document to plaintiffs' counsel).

Mr. Lyman: I haven't read it, your Honor, but we object to it simply on the date it is issued, May 9, 1960, which is more than two years after the period here involved. I, frankly, haven't read the contents, but on that basis I object to it.

Mr. Ewing: I would state as to that, your Honor, that it is directed to applicators and installers. I think it can be brought out that is what is stated herein was the same type of procedure that prevailed in 1954 to 1958.

The Court: I think you had better bring that out before this would be admissible, because if it speaks

(Testimony of Ralph E. Williams.)

as of the date it bears, prospectively, I would think it would be inadmissible.

Q. (By Mr. Ewing): Reading some of those items on there, one through seven, could you tell me whether [141] those things that are stated therein were applicable in 1954-1958; in other words, whether the same things applied although they were not reduced to writing at that time?

A. Like the rate of pay increase? I think you will find it in that bulletin.

Q. Were those things that are stated therein the same thing?

A. I will have to check them because I am not familiar with them. I will have to check against the other one, and that has been several years ago, yes.

Q. Do you want to check against the other one which I have (hands paper to witness)? There is a difference, isn't there? A. Check material.

The Court: Is this off the record?

Mr. Ewing: Yes.

Q. Taking No. 1, isn't that about the same as this one here, 6?

A. No, this is, just a minute.

Q. No. 1 and No. 6, aren't they about the same?

A. They are about the same, yes.

Q. Now, as to No. 7, I am not interested in how much here, but wasn't this the policy in 1954?

A. This one isn't on here.

Q. No, it isn't, but wasn't this policy "No extra labor [142] will be paid except when authorized by office." Wasn't that the policy in 1954?

(Testimony of Ralph E. Williams.)

A. I don't know what they had in Mr. McFarlane's office at that time.

Q. You were the production manager?

A. I was the production manager.

The Court: Is this back on the record now?

A. "No extra labor will be paid except when authorized by office. The rate of pay is based on the schedule dated May 6, 1960."

Q. Referring to any of these things on this May 9, 1960, bulletin, were any of those things applicable in 1954? A. Some of them were.

Q. Which ones were they?

A. Well, the caulking is similar, now that is not, flashing strip or casing trim, that applies to siding, whereas this one applies to windows only, no siding applied in this one, so that would be similar, and that one isn't in there. This is sidings, so that wouldn't be in this one.

Q. Was the same thing applicable in 1954, between 1954 and '58, even though it wasn't in writing at that time?

A. Well, we asked the boys to do their jobs, clean jobs, yes.

Q. Were these things, could these things be applied in [143] 1954?

A. Some of them could, yes.

Q. Well, will you tell me exactly which ones could?

A. Well, you could caulk around windows and doors, yes.

Q. Now, what else?

(Testimony of Ralph E. Williams.)

A. "Return all siding," it could have been siding and accessories, "to local office," because that was "No extra labor will be paid," yes.

Q. Here? A. I think that should apply.

Q. Pardon? A. That would apply.

Q. It did apply in '54 and '58?

A. Yes, I think he meant that to apply.

Q. It would have applied, wouldn't it?

A. It could apply.

Q. Now, referring to Defendant's Identification—

The Court: Back on the record?

Mr. Ewing: Yes, back on the record.

Q. Referring to Defendant's Identification No. 11, Mr. Williams, being a bulletin dated May 9, 1960, is it true that items 3, 4, 5, 6 and 7, although not reduced to writing between the period of 1954 to '58, were applicable at that time?

A. That would apply, yes. [144]

Mr. Ewing: I will move the admission, based on this testimony, of Defendant's Identification 11.

Mr. Lyman: Well, your Honor, I don't think that cures it, but I have no objection to its admissibility except for items 1 and 2, which have not been identified. Very well, no objection.

The Court: All right, it's admitted only as to Items 3 to 7, inclusive, right?

Mr. Ewing: That is correct.

The Court: All right, it will be admitted and although they don't need to be deleted, it's under-

(Testimony of Ralph E. Williams.)

stood that Items 1 and 2 are not to be considered as items applicable to the case, is that right?

Mr. Lyman: That is correct.

The Court: All right.

(Whereupon, said document was admitted in evidence as to Items 3 through 7, inclusive, as Defendant's Exhibit No. 11.)

Q. (By Mr. Ewing): Showing you Defendant's Exhibit No. 11, would you read No. 3 on that bulletin, please?

A. (Reading): "Keep yard and applied siding clean as work progresses. Pile scrap in neat pile." No. 3.

Q. In other words, in reference to No. 3 you are telling the applicators that they are to pile scrap in neat piles during the course of the job, and you are also [145] telling them to "Keep yard and applied siding clean as the work progresses," is that correct?

A. That is what that implies, yes.

Q. That is what it says, isn't it?

A. That is what it says.

Q. Would you read No. 4, please?

A. (Reading): "Make no suggestion to customer contrary to work order. If you question any item on the work order, consult salesman who sold the order or the local manager. Install according to company installation manual. We will only authorize payment for satisfactory work."

Q. Referring to this part that you just read, the

(Testimony of Ralph E. Williams.)

third sentence, "Install according to company installation manual," where is that manual; is it here today?

A. I don't know what manual, yes, do we have a manual here? I don't know, I am sure, this is for siding and there is a siding manual, applicators' manual.

Q. And from reading that sentence, it belongs to the company, it's a company installation manual, is that correct?

A. Yes, we give that to all customers, you know.

Q. To all customers? A. Customers.

Q. How about installers?

A. That is the installing contractors, they should, if they [146] have put on siding, they should have one, yes.

Q. According to this sentence they are supposed to install according to that manual, are they not?

A. Well, there is only one way you can put the siding on, that is in a neat manner, yes.

Q. Would you read No. 5, please?

A. (Reading): "Return all siding and accessories to local office."

Q. And No. 6?

A. (Reading): "Caulk around all windows, doors, and other openings before installing sill, flashing strip or casing trim."

Q. In effect, you are telling the installers in No. 6 to caulk around all windows, doors and other openings before installing sill, flashing strip or casing trim, in other words, if there is more than

(Testimony of Ralph E. Williams.)

one way to do this job, you are instructing the installers to do it this way, in other words, to caulk the windows before installing the sill?

A. This was new to most of them and to keep from having expensive repairs it's customary for most any company to put out a bulletin telling them how to apply siding.

Q. Mr. Williams, in effect, aren't you telling these installers how to do the job, then?

A. I didn't write this. [147]

Mr. Lyman: Just a minute, I want to object to that. I think it's argumentative, and between this bulletin and the statements thus far I think the Court can draw a conclusion.

The Court: Sustained.

Q. (By Mr. Ewing): Will you read No. 7, please?

A. (Reading): "No extra labor will be paid except when authorized by office. The rate of pay is based on schedule dated May 6, 1960."

Q. Well, from the first sentence in No. 7 as to any extra work the installer was to get authority from the office first before proceeding, is that correct? A. That is what it says, yes.

Q. Now, when you issued these bulletins to installers, I assume that you expected them to follow what is therein?

Mr. Lyman: Objection, your Honor, this is argumentative. It calls for a mental process.

The Court: Sustained.

Q. (By Mr. Ewing): Showing you Plaintiffs'

(Testimony of Ralph E. Williams.)

Identification No. 9, Mr. Williams, which is issued by Alesco Northwest, Inc., and Alesco Storm Windows, Inc., entitled "Code of Ethics and Cooperation," directed to all installation contractors, dated November 28, 1956, with no signature on it (hands paper to witness), I show you [148] that, are you familiar with that? A. Yes, I am.

Q. Are you familiar with the contents therein?

A. Yes.

Q. And having been issued in 1956 I assume it was applicable from '56 on, at least?

A. Yes.

Mr. Ewing: I move the admission of Defendant's Identification 9.

Mr. Lyman: No objection.

The Court: It will be admitted as Defendant's 9.

(Whereupon, said document was admitted in evidence as Defendant's Exhibit No. 9.)

Q. (By Mr. Ewing): With reference to Defendant's Exhibit No. 9, will you under the section called "AIM" will you read that paragraph, please?

Mr. Lyman: Objected to, your Honor. Your Honor, I am going to object to his reading it, it speaks for itself and I think it is unduly long and drags out the testimony.

The Court: Well, overruled.

Q. (By Mr. Ewing): Will you read it, please?

A. (Reading): "The installation contractor, who by his work must come in contact with the

(Testimony of Ralph E. Williams.)

customer, is in many instances a good-will ambassador, so to speak. [149] His appearance, actions, and work reflect directly back on whoever he is contracting for. By this token Alsco Northwest, Inc., has set forth the following Code of Ethics for your consideration."

Referring to this code of contact, it says, "Installers will be expected to present a neat appearance at all times." Could you elaborate on that a little bit, what do you mean by that?

A. Well, we have had coal heavers, and so forth, who have come and asked for jobs and we have given them jobs, and they were not exactly presentable.

Q. Isn't it true, Mr. Williams, that these installers were required to wear white coveralls?

A. No, not required to, they were preferred to wear them and if they paid for them themselves.

Q. You don't know what the policy of the company was? A. On the coveralls, I wouldn't.

Q. Would you—who would know?

A. Because I never insisted that they all wear coveralls.

Q. Who would know whether they were required to wear them or not?

A. I will say they wouldn't be required, I wouldn't know.

Q. Who could I ask to find out?

Mr. Lyman: Objection, your Honor, I think this is imposing on the witness a question that he couldn't possibly [150] answer.

(Testimony of Ralph E. Williams.)

The Court: Well, he can say so if he can't answer it, overruled.

A. I cannot answer the question because I don't know.

Q. (By Mr. Ewing): In reference to some installers, then, did they wear white coveralls?

A. Yes, they did.

Q. Was there any inscription on these coveralls, was there anything stated on these coveralls, any advertisement or anything like that?

A. Some of them had "Alesco" on them, yes.

Q. "Alesco" was printed right on the coveralls?

A. On the coveralls.

Q. And was there anything else on there?

A. It might have been there initially, I don't know, I don't remember.

Q. Point No. 2 in this Code of Ethics, referring to Defendant's Exhibit 9, it says: "Your manner should be efficient and such as to impress the customer with your knowledge of the job to be done." Can you elaborate a little bit on what you mean by "efficient," "your manner should be efficient"?

A. Well, we have shown them jobs that were put on, on our samples, and so forth, that they should know how to do a job, and we expected a job that would be satisfactory [151] to the customer.

Q. And would you read No. 3, please?

A. (Reading): "Your attitude with the customer is to be one of cooperation, friendliness and cheerfulness."

(Testimony of Ralph E. Williams.)

Q. Now, referring to page 2 of this Code of Ethics entitled "Specific points to watch," isn't it true that it sets out seven points in there, six of which start out with the words "Do not"?

A. That is right.

Q. And would you read those, please?

A. (Reading): "Do not fail to caulk all units that should be caulked.

"Do not try to cover up defective product of work.

"Do not leave out any pilot screws in two lite windows for any reason.

"Do not fail to pick up completion or cash.

"Do not make any appointment with the customer you do not or cannot keep, as they may stay home from work to keep this appointment.

"Do not leave any windows or doors that are not cleaned thoroughly inside and out.

"Always check with customer to find out which way they want their doors to hang."

Q. In reference to No. 3, "Do not leave out any pilot screws [152] in two lite windows for any reason," that would be during the course of the work, would it not?

A. That is a part of the window, it is just like leaving off a headlight off a car.

Q. And No. 1, "Do not fail to caulk all units that should be caulked," would the caulking process be done during the course of the job?

A. That is part of the job.

Q. Do you know whether, of your own knowl-

(Testimony of Ralph E. Williams.)

edge, whether these installers ever advertised for themselves as being in the business of installers?

A. Yes, I have found ads in the paper and called them and called installers who have had ads in the paper.

Q. They have advertised themselves?

A. Yes.

Q. And yet some installers, when they worked for you, were wearing white coveralls with "Alesco" printed on the coveralls, is that correct?

A. Not the ones, no, but they were wearing coveralls.

Q. Do you know of your own knowledge whether Alesco has ever asked any installer to advertise for them? A. Not to my knowledge.

Q. Has there ever been a time within your knowledge that an applicator or installer has been put off the job during the course of the job? [153]

A. No, I have had them walk off the job.

Q. Could an installer be put off the job by you during the course of the job?

Mr. Lyman: I want to object to that. Just a moment, that calls for a conclusion. I think you ought to find out if it has been done, and then what would be the circumstances.

Mr. Ewing: Mr. Lee testified this morning, and he heard Mr. Lee's testimony.

The Court: I think, Mr. Ewing, the thing to find out is this man's—if he had knowledge of the extent of his authority, if that is what you are asking him. I will overrule the objection on that

(Testimony of Ralph E. Williams.)

ground, but I think your question, you might re-frame your question.

Q. (By Mr. Ewing): Has any installer been removed from a job during the course of that job by you or at your direction?

A. Not to my knowledge, no.

Q. If a home owner supposedly upon completion of a job was dissatisfied with that work and called Alsco, would that call be directed to you?

A. Not normally, no; I mean, it might come down to me if they asked me to send someone out to do a repair job, or something.

Q. Have you ever received such calls from [154] that? A. Not from my office.

Q. Were there any occasions that you know of or within your own knowledge where an installer has been taken off a job that he originally started during the course of that job and moved to a second job?

A. Not unless he was willing to do so.

Q. That isn't the question, the question is: Has an installer been moved off a job which he started to do, a second job, before the first one was finished? A. I can't recite any one instance, no.

Q. You don't know, within your knowledge?

A. I don't know of a particular job, no.

Q. Taking a person of reasonable experience in this type of work, isn't it true that the job can be done without close supervision? A. Yes.

Q. What do you understand by the word "supervisor"?

(Testimony of Ralph E. Williams.)

A. Oh, "supervisor," my definition?

Q. Yes.

A. Would be one who would control the type—

Q. Control the what?

A. (Continuing): —the type of work and the quality of the work, and so forth.

Q. One who would watch over somebody else's work? A. That is right. [155]

Q. Based on that definition of a supervisor, would that type of person be necessary in this kind of an operation?

A. Not necessary, it couldn't, distance being a factor, you couldn't follow even the installing crews around.

Q. But I believe you have stated that you and Mr. Lee testified that he has gone out on the job and checked on occasion?

A. I heard him say that, yes, sir.

Q. And salesmen were supposed to go out and check them? A. He said that this morning.

Q. And these directives were issued to installers, were they not? A. Installing contractors, yes.

Q. Are there times, Mr. Williams, that the materials that are set out in a work order do not always, it doesn't always work out that those are exactly the materials that are needed for that job?

A. That could happen, yes.

Q. And that, therefore, a change has to be made?

A. It could be, yes.

Q. During the course of time it would take an

(Testimony of Ralph E. Williams.)

installer to make that change, how is he paid during that time?

A. We, at one time we, if they didn't have the material, if they had to come in, it was the fault of the factory [156] that the contractor didn't get the right material, we would pay him and make it worth his trip in.

Q. Well, Mr. Williams, if an installer has to make a change in a work order or in a job that he is doing during the time that it takes him to make that change, how is he paid?

A. There would have to be a different work order.

Q. Do you always issue work orders for changes? A. Not always.

Q. How is the installer paid during that time, do you know?

A. That is one time, I think, we paid them on an hourly basis for coming in and picking up the material and going back out.

Q. You paid him on an hourly basis during the time it took him to make the change and when he got back on the regular job included within the work order, he was back on a regular piecemeal basis, is that correct? A. That is right.

Q. There is a commingling, then, of per unit and per hour, and so forth, is that correct?

A. And the extra labor, why, we didn't want to see him out, yes.

Q. And, as I understand it from these directives,

(Testimony of Ralph E. Williams.)

any change that was to be made had to be made from your [157] office, first.

A. Not through my office, it would be sometimes checked with the salesman or the manager and he would direct me to send someone out.

Q. As you stated in this directive of May 7 which you say was applicable between '54 and '58, which states, "No extra labor will be paid except when authorized by office," that would be, or that would mean that all changes would have to be approved by the office, wouldn't it?

A. That is right, before they would be paid.

Q. If an installer was working on a cash job, in other words, he was directed to pick up cash, I assume he would, and he would take that down to Alesco, is that correct? A. Yes.

Q. You didn't pay him out of that cash, did you?

A. I paid none of them, we had a payroll department that took care of the payroll.

Q. Do you know how these installers were paid?

A. I am positive they were paid by check.

Q. But when a change had to be made in a job, I assume that the installers would come down to the office and report that complaint to Alesco's representatives to find out what the trouble was. Now, do you know of your own [158] knowledge whether that same installer always went back and finished that job?

A. Not always, no, generally, I mean, it was a new contract, any additional work would be adding to the contract that he would be working on.

(Testimony of Ralph E. Williams.)

Q. Are you saying that sometimes when there was a change in a contract or sometimes when an owner would not sign the certificate certifying satisfaction with the job, such fact would be reported to Alsco, but there were times when that same installer did not go back and finish that job up?

A. When it was a condition where there would be no danger and the installer was out of town and the applicator, we would wait until he got back to town to do his own service, because he is held responsible for the job, as the contractor.

Q. Do you know of your own knowledge where there have been occasions where another installer other than the one who started that job would come back and finish it?

A. If a contractor had quit and left the job unfinished, we would have to have someone else go back and finish the job.

Q. Would that be the only reason or purpose that you know of where that situation would happen?

A. That would be the only reason I know of. [159]

Mr. Ewing: That is all I have.

Redirect Examination

By Mr. Lyman:

Q. Mr. Williams, do you remember this morning before the recess counsel asked you if you hired the applicators, and I believe you answered "yes," do you recall that? A. Yes.

(Testimony of Ralph E. Williams.)

Q. And I believe he asked you, did you discharge the applicators, and I believe you said "yes." Now, would you tell us what you meant by "discharge"?

A. Well, if a man didn't complete a contract, violated a contract, why, we wouldn't give him another contract.

Q. In other words, you considered each one of these work sheets as a separate undertaking?

A. As a separate contract.

Q. And if you would not give him another contract, that was not renewing the relationship, is that what you are trying to say?

A. That is right, that is what I am trying to say.

Q. Now, counsel was asking you whether you took anyone off a job during the course of the work, do you recall that? A. Yes.

Q. You have to answer. A. Yes. [160]

Q. Now, isn't it true that when there was an interruption in the work, in the course of the work, it was usually that the man himself, the applicator left the job?

A. That is right, we didn't pull him off the job.

Q. I don't believe I asked you who determines the hours that these applicators work?

A. Oh, they work as many hours as they wish.

Q. And are there any particular days that they are required to work? A. No, sir.

Q. And they work on holidays, Sundays?

A. They can, yes.

Q. Do you know whether these men have done

(Testimony of Ralph E. Williams.)

work for customers and were paid directly by customers?

A. In some instances, yes, there have been.

Q. Now, from your understanding and your experience with Alsco during this period, how much of the work was done was considered this extra work that you paid by the hour, relatively how much?

A. Oh, golly, less than one per cent. I would say, I mean.

Q. Now, was there anything in the arrangement that you had with the applicators when you took them on that you would guarantee them a certain number of jobs? A. No.

Q. And did they ever promise to do a certain number of jobs [161] for you for certain favors?

A. No.

Q. Now, it's your intention, is it not, to remain in the shop, and you do have a shop there with tools and a regular sort of manufacturing the windows process, is that correct? A. That is correct.

Q. And you are the foreman or supervisor of those people who work in the shop, right?

A. That is right.

Q. Now, how does their, for instance, their vacation differ from the time taken off by the installers and applicators?

A. Well, shop workers who work by the time clock, they work one year, they get a week's vacation with pay, and then for each additional year up to, they get one day up to two weeks.

(Testimony of Ralph E. Williams.)

Q. And who determines the schedule when they go? A. We do.

Q. The company does?

A. Yes, the company does.

Q. Now, tell me, when these installers and these applicators want to take time off from their work, how is that done? A. They just took time off.

Q. When do they go, how many times a [162] year?

A. I wouldn't know, because I have no supervision over them. I mean, I was not out there with them.

Q. Well, do they go more than once a year, many of them? A. Some did.

Q. During your busy seasons when you had your greatest number of contracts, would any of these installers leave for any reason to go hunting, for instance? A. Oh, yes; yes, sir.

Q. Was that usual or unusual?

A. That was usual.

Q. Now, getting back to your particular duties, it wasn't your function particularly to go out on a job and supervise it, was it? A. No, it wasn't.

Q. And it was only in the customer complaint department that you did go out? A. Yes, sir.

Q. Did the company hire anyone for the purpose of overseeing the work of these installers, if you know? A. No, sir.

Q. Now, counsel has shown you Exhibits 9, 10 and 11, isn't it a fact that those exhibits are suggestive of the way the work should be done (hands

(Testimony of Ralph E. Williams.)

papers to witness)? A. Yes, sir.

Q. Now, when these bulletins were issued from time to time, [163] isn't it true that the customers still came in and complained? A. Yes, sir.

Q. And did anyone, was anyone discharged as a result of these customer complaints?

A. I have a time or two refused to renew a contract, wouldn't give them any more contracts to take out, yes, until they got the jobs finished.

Q. Now, isn't it a fact that those bulletins really express that the work should be done in a workman-like manner, isn't that all it says?

A. Yes, it's more or less a leader.

Mr. Ewing: I object, your Honor, as a conclusion of the witness.

The Court: It's an exhibit, isn't it?

Mr. Lyman: Yes, it speaks for itself, it's true.

Q. Well, let's put it this way: Was it your purpose in putting this out to remind them to do their work in a workmanlike manner?

A. That is right.

Q. Let me ask you this, sir, I notice you have the notice there, notice to contractor, and it is dated 1954. Do you notice that in Exhibit 9, I believe, all installation contractors, do you see that heading?

A. 1956? [164]

Q. 1956, you are right. Yes, in 1956 you issued a bulletin to all installation contractors?

A. Yes, sir.

Q. That is Plaintiffs' 9? A. Yes.

Q. Now, at the time you issued that bulletin did

(Testimony of Ralph E. Williams.)

you know of your own knowledge that Alesco was withholding taxes and social security taxes and withholding taxes from the earnings of these men?

A. I did not.

Q. As a matter of fact, when did you learn that during that period of '54 to '58 that such taxes had been withheld? A. Today.

Q. In other words, you never had contacted the payroll end of it?

A. No, other than to okay for payment the contracts when they were returned to me.

Q. In all the years you were with Alesco you never got into a discussion of this particular problem with any of the front office, so to speak?

A. No.

Q. Nor any of the men? Did any of the men raise the question to you? A. No, sir. [165]

Q. Now, as far as the bulletin, I think it's No. 11, where they make certain suggestions to the installers, isn't it a fact that these men took pride in their work?

A. The majority of them did, yes.

Mr. Lyman: I believe that is all, your Honor.

Recross-Examination

By Mr. Ewing:

Q. I will ask you again, Mr. Williams, do you know of your own knowledge whether an installer has ever been taken off a job at the direction of Alesco personnel during the course of the job?

A. I can't cite a specific instance, no.

(Testimony of Ralph E. Williams.)

Q. These installers don't move from one job to another at their own whim, do they?

A. They have that prerogative if they take out a group of contracts, to get those, that sometimes the customers are ill, they can't do their job, they will move to another contract.

Q. You don't know of your own knowledge whether they have ever been asked to move from one contract? A. Not to my own knowledge.

Q. As to this figure of less than one per cent of their own work.

A. I just picked it out of my own [166] knowledge.

Q. You don't know whether it is one per cent exactly?

A. No, I wouldn't say one per cent. [167]

* * *

DONALD E. LEWIS

called and sworn as a witness on behalf of the plaintiffs, testified as follows:

Clerk of the Court: Please state your full name.

A. Donald E. Lewis.

Clerk of the Court: Thank you, please be seated.

The Witness: All right.

Direct Examination

By Mr. Lyman:

Q. What is your present address, Mr. Lewis?

A. E. 8002 Shannon, here in the city, yes.

(Testimony of Donald E. Lewis.)

Q. And what is your occupation?

A. At the present time I am partner-owner of Capital Aluminum Company.

Q. Now, taking you back to the years 1954 to 1958, were you performing services for Alseco Storm Windows and Alseco Northwest, Inc.?

A. Yes, I was.

Q. Or either of the two corporations?

A. Yes.

Q. And what was the nature of your [168] service?

A. I worked as a window installer, windows, doors.

Q. And during that period how were you paid, what was the basis of your compensation?

A. It was on piece work, piece work basis, so much a unit.

Q. And did you do any siding? A. No.

Q. Yours was purely a window—

A. I think I put on one siding job while I was there, or helped on that.

Q. And you were paid per square?

A. Per square, yes.

Q. Now, when you would get one of these work orders, and I will ask you here, is this Exhibit 8, Exhibit 6, for example, are they typical of the work orders that you would receive?

A. Yes, they are.

Q. And would you get more than one, sometimes, in the same day?

(Testimony of Donald E. Lewis.)

A. Generally, yes, we would get several at a time, sometimes, depending on how busy we were.

Q. And then you would take these work orders and you would go to the factory and load the windows, am I correct?

A. Yes, that is right; of course, we got the orders and the windows at the same time.

Q. And then you would proceed to the job site? [169] A. Yes.

Q. Now, did you take anyone with you?

A. No, not necessarily.

Q. Did you ever hire a helper?

A. No, I never did, myself.

Q. Now, how would the company know when a job was finished?

A. Why, we would come back in, we were required to come in the same day that it was finished, but usually pay day was on a Friday, we would bring our orders in at that time.

Q. In other words, you might finish a job early in the week but you would save up these work orders and present them at one time?

A. That is right, generally.

Q. Were there times when you didn't report for, perhaps, two or even three weeks?

A. If we were out of town, that was true.

Q. Then you would bring them all in together?

A. We have done that, or we have mailed them in, either way.

Q. Have you ever had occasion to draw pay or

(Testimony of Donald E. Lewis.)

compensation against work that was not yet complete, you, personally?

A. We used to make a draw all the time, most of us fellows, before we left, out of town trips, especially.

Q. And that would be applied against [170] work?

A. Against the work that we were taking out, yes.

Q. And then you got the balance when you came in? A. Yes.

Q. Did you ever have a situation where you hadn't completed a job on a Friday, but you would draw up to what you had done?

A. Well, generally, if it was our own doing, if the job wasn't done, we didn't get paid until it was finished.

Q. In other words, the job had to be completed before you were actually entitled to your pay?

A. Unless it was like a salesman there, then they would pay us for what we had done.

Q. Now, in this arrangement that you had with Alesco, did you have any understanding with them that you would be guaranteed any particular number of jobs? A. No.

Q. And did you work out any arrangements with Alesco that you would do a certain number of jobs for them? A. Not in this business.

Q. Yes. In other words, when you completed one of these work orders that you have in front of you, you came back for another one, as a rule?

(Testimony of Donald E. Lewis.)

A. Well, that is right, several, you know, like say maybe one, maybe several.

Q. Under the arrangements you were not required to come back [171] at all, were you?

A. Well, if we picked up a little cash, it would have been a good idea.

Q. No, but I mean under the arrangements you could have taken none, or worked elsewhere, as you so desired?

A. Oh, yes, we probably could have.

Q. Now, I believe you were the one, or one of the gentlemen who were named by these witnesses that when the work was slow you got whatever work there was available, am I correct, did you work pretty steadily? A. Yes, I was pretty steady.

Q. Do you know of your own knowledge that there were a number of installers for Alsco that came and went during the year?

A. Yes, several, several.

Q. And do you have any knowledge that some of these installers would work for other companies in between jobs for Alsco?

A. Well, I will tell you, I was usually so busy myself that I didn't pay too much attention on that kind of a deal, I don't really know on that; some came and left and would come back again eventually, but whether they worked in between orders or not, I don't really know.

Q. All right, sir. Now, when you would put on a window sometimes a salesman would mis-measure,

(Testimony of Donald E. Lewis.)

you would have [172] to put in a piece of wood of some kind, am I correct in that?

A. Yes, that is right.

Q. Now, that not being measurable by a unit, how would you be paid for that?

A. Well, that would fall into this extra labor class, hourly basis.

Q. Now, was there a time when you were with Alsco that you would just give them a flat price, rather than so much per hour?

A. Not to my knowledge.

Q. In other words, the hourly rate is what you thought the job was worth? A. That is right.

Q. Now, no one ever checked your hours, did they? A. Not on the job, no.

Q. They took your word for whatever you came back with? A. Yes.

Q. If you thought the extra work was worth ten dollars, you would divide that into so many hours?

A. Well, we kept track of our time, we were expected to do that.

Q. Did you do that on the back of the sheet?

A. Well, on the orders we had to turn in, we were supposed to have on there how many hours you worked. [173]

Q. Are any one of these orders yours, particularly? A. No.

Q. That is Mr. Aronson, that is George Aronson; Mr. Aronson, I believe, was named as one of the steady people? A. Yes.

Q. Do you notice here "Charge extra labor,

(Testimony of Donald E. Lewis.)

\$3.50," do you notice that? A. Yes.

Q. Nothing about hours on there, is there?

A. No.

Q. So there wasn't a requirement that you list the number of hours?

A. No, actually there wasn't a requirement that we had to.

Q. Now, in doing these jobs, you provided your own tools, did you not, sir?

A. Yes, that is right.

Q. Now, tell me, can you give us a brief description of what these tools consisted of?

A. Well, most of us carried either a band saw or a bench saw, metal cutting blades, and hand tools, and that type of thing.

Q. Now, with your tools and equipment necessary to do this job, how much of an investment do you have in it, aside from your truck? [174]

A. Oh, I would say one-fifty, two hundred, in there somewhere.

Q. And then you have your own truck, is that correct, sir? A. Yes.

Q. Maintain your own liability insurance?

A. That is right.

Q. And you maintained the truck as far as repairs are concerned, without reimbursement?

A. That is right.

Q. And when you go out of town for a number of days or a week, why, who pays the expenses incident to that? A. We paid our own.

Q. Out of the gross amount?

(Testimony of Donald E. Lewis.)

A. Yes, that is right.

Q. Have you ever taken time off away from the company during the season when they had some work orders? A. Oh, yes.

Q. And then you came back?

A. Yes, came back to work.

Q. And where would you go?

A. Well, I was one of these hunters they are talking about.

Q. Now, who fixed the hours of those installers, or your hours?

A. We set our own hours, actually.

Q. Did you work on holidays or Saturdays, Sundays? [175]

A. Yes, several times.

Q. Was there any guarantee of compensation here outside of the piece work rates? A. No.

Mr. Lyman: I believe that is all.

Cross-Examination

By Mr. Ewing:

Q. Mr. Lewis, I think you stated you worked for Alesco during the period 1954 to 1958?

A. Yes, that is right,

Q. And that was as an installer? A. Yes.

Q. Did you ever advertise that you were in the business of an installer at that time? A. No.

Q. Did you have any advertising on your truck at all? A. Nothing, no.

Q. Did you advertise in the paper at all?

(Testimony of Donald E. Lewis.)

A. Nothing.

Q. In reference to these white overalls, did you wear these white overalls? A. Yes, I did.

Q. Did you feel required to wear them?

A. No, I don't think there was any ruling out that we had [176] to wear them.

Q. Who paid the cleaning charges on them?

A. We paid those ourselves.

Q. And was there an advertisement with "Alseo" inscribed on the coveralls?

A. On the back, yes.

Q. Did they encourage you to wear them?

A. It presented a neat appearance, yes; they naturally wanted that at all times.

Q. Had Alseo ever approached you to advertise for them in any other way except this white uniform?

A. Oh, we were approached several times by Mr. McFarlane as to putting a sign on the truck, or something like that.

Q. Will you explain that, please?

A. Well, I mean he, as I say, several times he would come out and discuss about he would pay the charge if we would put a sign on the sides of our pickups.

Q. A sign advertising Alseo?

A. Advertising Alseo, yes.

Q. On your own trucks? A. Yes.

Q. Did you do that? A. No.

Q. Was there at the time you picked up these work orders, [177] was there any explanation given

(Testimony of Donald E. Lewis.)
to you by Mr. Williams at all on these work orders?

A. Nothing unless it was a special job.

Q. And what would be a special job?

A. Well, there happened to be some from a, oh, little carpentry work; in other words, it would fall back in this extra labor bracket again: I mean, something that we didn't know should be done until we got there.

Q. As I understand it, as to the extra work you were not paid by the unit?

A. No, not on extra work, no.

Q. Have you always figured your extra pay up based on hours? A. Oh, yes.

Q. Have you ever refused a work order?

A. No, none that I can think of.

Q. Do you feel that you are free to accept or reject work orders?

A. Well, that could be answered two ways; I mean, in most cases you didn't want to refuse them because it was your income.

Q. Could you have had any fear of rejecting a job and still keeping your job?

Mr. Lyman: Objection, your Honor. Now, we are getting into real conjecture here.

The Court: I think we are. Would you read the [178] question, Mr. Reporter?

(Last question read.)

Mr. Ewing: Did you sustain that?

The Court: Yes.

Q. (By Mr. Ewing): Did Alesco discourage you

(Testimony of Donald E. Lewis.)

at all from working for competitors when they had no work for you?

Mr. Lyman: I object to that, your Honor. There is no foundation laid for that, and that is, again, a conclusion and asks for a mental process.

The Court: Oh, the word "discourage" is used, I think he may answer; overruled.

A. What was the question, again?

(Last question read.)

Q. (By Mr. Ewing): The question was: Did Alsco discourage you at all from working for competitors when there was no work available?

A. When there was no work there, no, I wouldn't say that they did.

Q. Have you ever been called into Mr. McFarlane's office in reference to working for somebody else?

A. It was mentioned on an occasion or two, yes, when we were busy.

Q. And would you relate the incident, if it was an incident, or what? [179]

A. Well, yes, I mean, the one I recall is at the time he seen Mr. Busby's pickup and mine in front of a competitor's place, and called us both in and asked us, you know, what we were doing there, if we planned on quitting, or going to work for him, or just what we were doing.

Q. Mr. McFarlane called you into his office?

A. Into his office, yes.

Q. Did he see you out there, or something?

(Testimony of Donald E. Lewis.)

A. Yes, he happened to go by while the trucks were setting there.

Q. They were your trucks? A. Yes.

Q. Were you doing a job for Alesco at the time?

A. I wasn't doing anything right at the time.

Q. What was the conversation between you and Mr. McFarlane in reference to it?

A. Well, that is kind of hard to remember, Mr. Ewing, that far back.

Q. Substantially.

A. Well, one of Mel's favorite deals there was loyalty to company, you know, as far as going to work for someone else.

Q. Mr. McFarlane mentioned or talked to you about loyalty to the company? [180]

A. He has made that, used that phrase several times.

Q. And yet you were not doing a job for Alesco at that time?

A. Not right at that time; as far as having windows on the truck, or anything, I didn't, because that was one of the things that was brought up in the conversation between the three of us.

Q. Were there times when changes had to be made in a work order?

A. Yes, there would be.

Q. During the time it took you to make the change during that period of time, how were you paid for that period of time?

A. Well, now, that depends on what kind of a change you would mean. In other words, if it was

(Testimony of Donald E. Lewis.)

an error in measuring, or something like that, we would bring the order back in and write up the order for the new unit and then take out other work.

Q. Were you paid during the time it took you to do these things?

A. No, that part of it, no, we were paid for putting the units on, that was expected to go along with that.

Q. Have you been moved from one job to another at all; in other words, have you started one job and been moved to another job before the original job was finished?

A. I think most of the old fellows have at one time or [181] another been asked to do a rush job, or one that might be on the verge of cancellation, or something like that.

Q. You have been asked to go off that job and start another job? A. To do another one, yes.

Mr. Ewing: I think that is all I have.

The Court: Would you go back to the first job when you did?

A. Yes, we were expected to go back on our original job.

Redirect Examination

By Mr. Lyman:

Q. In other words, both those jobs were yours?

A. Yes, that is right. Once the order was given to us it was considered our order.

Q. And if a customer canceled out, why, you would lose that pay, wouldn't you?

(Testimony of Donald E. Lewis.)

A. We would just turn our pay back in, right.

Q. That is one you lost, they didn't pay you for that at all?

A. They might pay you for the trip out, I mean it wasn't your fault because it was canceled, or something like that, but that was all.

Q. But on that, where there was faulty workmanship apart from the materials, were you required to go back and do [182] that on your own time? A. I never had that happen to me.

Q. Well, now, that brings up a point in that incident in McFarlane's office, isn't it a fact that the reason he questioned you, he considered you the prime installer in his organization?

Mr. Ewing: I object, your Honor, this would be a conclusion of the witness.

The Court: Sustained.

Q. (By Mr. Lyman): Well, did he ever say anything about the nature of your work?

A. Oh, yes.

Q. Compliment you? Pardon?

A. Yes, they have.

Q. But in talking to you about that incident he didn't guarantee you any money, any salary, or anything?

A. Oh, no, no, he didn't offer any raises.

Q. Just, it was all conversation?

A. Yes, that is right?

Q. Are you a competitor today of Alesco?

A. Oh, yes.

Mr. Lyman: That is all I have.

(Testimony of Donald E. Lewis.)

The Court: Don't you get your supplies from them?

A. Yes.

The Court: They wholesale, don't they? [183]

A. Yes, we also wholesale.

* * *

ALLEN L. GREEN

called and sworn as a witness on behalf of the plaintiff, testified as follows:

Clerk of the Court: Please state your name to the Court.

A. Allen L. Green.

Direct Examination

By Mr. Lyman:

Q. Where do you live, Mr. Green?

A. 620 W. Augusta.

Q. And what is your occupation?

A. Well, I am an installer, aluminum siding installer.

Q. And during the years 1954 to '58 and any particular year during that time, did you perform some, either carpentry or installation services for Alsco?

A. Yes, in '57, I believe it was, and '58.

Q. And did you install awnings, I mean, pardon me, windows as well as aluminum siding?

A. Yes. [184]

Q. What is the difference between the two in the work that you do?

(Testimony of Allen L. Green.)

A. Oh, there is quite a little difference, a window is a window, and siding sure isn't the same.

Q. Well, now, a window was a finished product that you could fit into a pre-arranged space?

A. Yes, in that sense of the word, yes.

Q. And the siding, on the other hand——

A. Each piece, practically, has to be cut and fit; not all of it, but a good share.

Q. Now, how were you paid for the windows?

A. A unit, by the unit.

Q. Then on the siding, then, how were you paid?

A. By the unit.

Q. Now, when you ran into difficulty on the siding job, let's say that you come to an unanticipated obstruction or rotten boards, what would happen then in regard to pay, what would you do?

A. Well, if it was extra work, some minor detail, I know in my case I just went ahead and did it and turned in my time and I was paid for it by the hour, but if it was something, if the company made the statement that he had been promised this or that, then I immediately referred it back to the higher-ups.

Q. And then what would you do, go back to the office and [185] discuss this contract with them?

A. Well, not particularly; usually, I guess that in most cases, if it is of any importance they discussed it with the salesman, as he was the one that would have to pay it, and then if they thought it was justified, they told me to go ahead, and I turned in my time by the hour on it.

(Testimony of Allen L. Green.)

Q. Now, on these siding jobs did you ever get paid for the extra work on any other basis than by the hour? A. No, other than by the unit.

Q. By the unit? Now, comparing the amount of work that you were paid for per square, and the amount per hour, percentagewise, which was the greater?

A. Oh, a lot of variation with different days, there would be parts of houses that it would be slow on the siding, and then there would be other parts that would go fast, but taking it in my present work I do much better on the scale by the piece than I do by the hour.

Q. But in an ordinary siding job on a house, it's more per square unit rate than there is any other?

A. Oh, yes.

Q. In other words, the hourly rate, that would be the extra work, would be a minor part of it, am I correct, sir? A. Oh, very.

Q. Now, did you ever do any work for a customer of a minor [186] nature where you dealt directly with the customer?

A. Well, blessed if I can think of any right off-hand, particularly. It seems to me that I did hang one door that they paid me for extra, but I don't recall whether I was working for Alsco at that time, or another party by the name of Fred Storey.

Q. Well, that wasn't unusual in this business, to do this little extra work for customers, was it?

A. Well, it is unusual, yes, because in most cases

(Testimony of Allen L. Green.)

you are required to do, it was usually figured ahead of time, the contract was a set price.

Q. I was wondering if you ever got into a situation where a woman wanted some shelves in a basement for some preserves? A. No, I never did.

Q. Now, did you ever do work for Alesco and then do work for someone else and then come back to Alesco?

A. Oh, yes, I started to work for Alesco in 1950, and then worked for them for several months, and then dropped out and went back to carpenter work, and then again went back to Alesco, I think it was four or five, maybe six times that I worked for others, and then for Alesco.

Q. And while you worked for Alesco, was there an occasion where you did a job on your own that was not necessarily in windows or siding, but it was in this nature of home [187] improvement?

A. Yes.

Q. Then you came back to work for Alesco after that? A. Yes.

Q. And you had your own tools? A. Yes.

Q. And your own truck? And who fixed your hours of work? A. Myself.

Q. And are you one of these hunters, this group?

A. Well, no, I didn't happen to be particularly. I, on a couple of occasions, I took a couple of days off and went to the coast to see my daughter, and I didn't ask anybody about it, I figured it was my own business. I went over and saw her and didn't say anything about it.

(Testimony of Allen L. Green.)

Q. When you came back did you pick up some work orders?

A. Well, I still had some with me.

Q. Then you completed those and turned in a sheet?

A. I completed those, they were not too particularly busy at that time, they were not rushed, I wasn't hurting the company any.

Q. They didn't hire you?

A. That is right.

Q. Did you ever have a helper?

A. Well, from my standpoint I would only class it as a helper, as a working partner. [188]

Q. Well, you worked together with someone?

A. That is right, as I have heard this word used here of "hire." Well, in my own case I would usually contact somebody and just ask them if they wanted to go to work with me on a partnership basis. I would take out my operating expense and then we would split the difference.

Q. But Alsco wouldn't tell you how much to give this man? A. No, oh, no.

Q. They would pay you?

A. Oh, no, out of courtesy to me, saving me on some bookkeeping, I would split it up and then they would write out checks for the other fellow, and mine, also.

Q. But you directed how the money should be split? A. That is right.

Mr. Lyman: I believe that is all, your Honor.

(Testimony of Allen L. Green.)

The Court: May I ask him, did you belong to a union, Mr. Green?

A. Yes, I do, the Carpenters' Local.

The Court: Does Mr. Lewis belong to a union?

Mr. Lewis: No.

The Court: Do you know?

A. I don't know, I wouldn't say.

The Court: Were these always union jobs you went on? [189]

A. No, when you are working on your own, why, I ran into that quite often. I would go into, oh, like Moses Lake, Wenatchee, Ephrata, and, oh, possibly somebody would see me working out and they would question about whether I was a union man or not, and when I explained I was doing it on contract, there was nothing more said.

The Court: Do you have a certificate entitling you to purchase supplies without paying sales tax?

A. No, I don't, personally.

The Court: Then you are not actually operating as an independent contractor at all times?

A. Well, only when I bought anything. While I was working for Alesco I bought it under Alesco's name.

The Court: And used their tax number?

A. How is that?

The Court: And used their tax number?

A. No, I don't recall on that.

The Court: Well, did you pay a sales tax on it?

A. Yes, I think so, because it was only small items.

(Testimony of Allen L. Green.)

The Court: I think perhaps, Mr. Ewing, we might have a recess now, we have been going since two here. Ten minutes.

(Whereupon, a recess was taken for a period of ten minutes.) [190]

Cross-Examination

By Mr. Ewing:

Q. Mr. Green, when did you go to work for Alsco?

A. I think it was in 1950, the first time.

Q. And how many applicators did they have working for them at that time, if you know?

A. Well, I wouldn't know for sure, but I believe that here locally at that time that there was around four or five, something like that.

Q. And in that event did you go to the end of the list when you applied for a job out there; in other words, if they have four work orders and you are the fifth man you wouldn't get a job, is that correct?

A. Well, I suppose that if orders were gone, I wouldn't get a job, that was for sure.

Q. Have you ever gone out to Alsco at a time and asked for work when they didn't have any available for you? A. Yes.

Q. And at that time you would go to work somewhere else? A. That is right.

Q. In the course of working on particular work orders for Alsco, did anybody ever come out to look at the job on any of the jobs you have been on?

(Testimony of Allen L. Green.)

A. Yes, the man that sold the job, to be honest, but the man that sold the job came by, and I think for no other [191] reason that to see if I might have picked up a lead, somebody that was interested in it, but the man that was with him was the salesman and he started to tell me how to do it. It didn't take me long to tell him that it was none of his business, and we soon settled that.

Q. You didn't follow his directions at all?

A. No.

Q. Yes. Have you been moved at all from one job to another?

A. I don't recall of it, other than in instances of where for some reason or other it was a question of being idle when I was waiting for some extra windows to be made or for some material to be shipped to me, or something of that nature, and then if I had other work, I went elsewhere; if I had another contract I would go elsewhere and work on that, and finish up when I got the extra windows or extra material.

Q. Would you always return to the original job and finish it up?

A. Oh, yes, we were required to do that, as far as that goes.

Q. Showing you Defendant's Exhibit No. 9, which is a Code of Ethics and Cooperation, did you get a copy of that when you worked for Alesco?

A. Well, it seems as I did, yes, I believe so.

Q. Did you read it? [192]

A. Well, that is about all I did do, was read it;

(Testimony of Allen L. Green.)

when I first went to work for Alsco it was during the slack time in the carpentry business, and I wasn't figuring on any particular steady employment with them, I just took it as a fill-in.

Q. You recall receiving this bulletin?

A. No, not personally.

Q. You never recall receiving that?

A. No, this part here, I had this, and then I had another sheet that was attached, because I believe I had some price lists on it, and that sort of thing, but to be honest, I don't particularly recall, I don't recall this one, of all these "do nots," I really don't.

Q. You don't recall receiving anything?

A. No, not on that one.

Q. As I understand, you didn't install windows, you installed aluminum siding?

A. Well, I started in with them on windows, and then later I switched over to siding when they started installing it.

Q. Are you working for Alsco now?

A. No.

Q. In reference to extra work, if it was something more than a minor detail, would you get that cleared through Alsco, first? [193]

A. If it was of any size, of any importance, yes; if it was just something that was minor, why no.

Q. If it involved any change in money at all, would you contact Alsco?

A. Yes, because I believe that it was up to the salesman to say whether he wanted to pay that

(Testimony of Allen L. Green.)

extra or not, or whether he wanted to talk the customer into paying it.

Q. I believe you stated you don't have a contractor's card or a tax card? A. No.

Mr. Ewing: I think that is all.

Mr. Lyman: No further questions.

The Court: Just a moment. You paid workmen's compensation, industrial insurance?

A. How is that?

The Court: Did anyone pay industrial insurance or workmen's compensation on you and your associates?

A. Well, now, I don't recall. Usually while I was working for Alsco, I don't just remember in that sense about just how that worked out on that deal. Each time that I went to work for Alsco it was in the wintertime and carpenter work was slack as a rule, and I didn't question particularly about that, as I recall, to be perfectly honest.

Q. Were there any deductions in your [194] check?

A. There was at one time, and then of recent times, I believe in 1958, I believe it was, that there was not.

The Court: You don't know whether they deducted anything for industrial insurance?

A. No, I don't know; really, I can't really say on that, on the industrial insurance. No, I can't really say on that.

The Court: That is all.

(Witness excused.)

Mr. Lyman: No, no questions. Again if I may, your Honor, I object.

The Court: Sustained, strike it.

Mr. Lyman: I am sorry, your Honor. It always raises a red flag, a question like that. Your Honor, the plaintiff rests.

(Plaintiffs rest.) [195]

* * *

Defendants' Case in Chief

GEORGE ARONSON

called and sworn as a witness on behalf of the defendant, testified as follows:

Clerk of the Court: Please state your name to the Court.

A. George Aronson.

Clerk of the Court: Thank you, please be seated.

Direct Examination

By Mr. Ewing:

Q. Mr. Aronson, what is your address?

A. 4924 N. Stevens.

Q. And how long have you lived in Spokane?

A. Well, I have been in and around Spokane since 1937.

Q. Have you ever worked for Alsco Storm Windows, Inc., or [196] Alsco Northwest, Inc.?

A. I have worked for both of them.

Q. And who are you employed with at the present time? A. AllState Aluminum.

(Testimony of George Aronson.)

The Court: Who, again?

A. AllState.

The Court: AllState what?

A. Aluminum Products.

Q. (By Mr. Ewing): And what years did you work for Alesco?

A. I worked for Alesco from about '48 on to about '58 or '59, I think, or later.

Q. You were working at Alesco between the periods of 1954 and 1958? A. Yes.

Q. Can you describe your duties; generally, what did you do for Alesco?

A. Why, I installed doors and windows.

Q. You were an installer? A. Yes.

Q. Was that in homes, did you make installations in homes? A. Yes.

Q. Was this continuous employment for you?

A. Yes, sir.

Q. Have you ever worked for anybody else during the period [197] that you worked for Alesco?

A. No, I haven't.

Q. They had continuous employment for you?

A. Always.

Q. How were you contacted when Alesco had a job to be performed?

A. Well, I would either be called at the house or I would go out to the plant and pick up my orders.

Q. Were there times when you picked up more than one order? A. Oh, yes, several.

Q. Yes, could you pick out orders you wanted to,

(Testimony of George Arouson.)

or did you have any discretion as to what orders you wanted to take?

A. No, they was issued to you.

Q. Did you accept all orders that were given to you? A. Yes, sir.

Q. Did you feel that you could accept or reject any order that was offered to you?

A. I probably could have but I didn't.

Q. You have never rejected an order, is that correct? A. No, sir.

Q. At the time you picked up your work orders, was there any conversation at that time between you and any of the representatives for Alsco in reference to those work orders that were picked up? [198] A. I didn't quite get you, sir.

Q. At the time certain work orders were issued to you, was there any conversation at that time between you and a representative from Alsco in reference to that work order?

A. No, sir, I don't believe so.

Q. In other words, you just picked up the work orders and went out to the job?

A. That is right.

Q. Who fixed the rates at which you were to be paid?

A. Well, it was a set price, yes, they made up the price list and that is what we went by.

Q. Did you share in discussions as to what you were to be paid?

A. I think there was one or two meetings that—

(Testimony of George Aronson.)

Q. That there were?

A. That they had, that we come to, what we was supposed to be paid.

Q. Do you share in the profits or losses of Alesco's business at all? A. No.

Q. Have you ever advertised in the paper that you were an installer? A. No, I never have.

Q. Do you ever advertise in any phone [199] book? A. No, sir.

Q. How do you get to work, do you have your truck or pickup? A. I have my own pickup.

Q. And did you have your own pickup at the time in question as between 1954 and 1958?

A. Yes, sir.

Q. Is there any advertisement on your truck indicating that you were an installer?

A. No, no advertising whatsoever.

Q. In other words, you have never held yourself out to the public as being engaged in business for yourself? A. No, sir.

Q. Has Alesco ever asked you to advertise for them?

A. There was a couple of times, yes, they wanted us to put advertising on.

Q. Pardon?

A. There was a couple of times that they asked us to put advertising on our trucks.

Q. They wanted you to advertise Alesco on your trucks? A. Yes, that is right.

Q. Did you do that? A. No, we didn't.

Q. When you were performing jobs for Alesco,

(Testimony of George Aronson.)

that were based on these work orders issued to you, did you wear ordinary [200] clothing, or what?

A. Oh, we wore coveralls the biggest part of the time, yes.

Q. Are you referring to the white coveralls issued by Alsco? A. That is right.

Q. As a rule, did all installers wear these?

A. Most all the boys did, yes.

Q. Were you encouraged to wear them?

A. Well, they wanted us to wear them, yes.

Q. And as I understand it, well, on the coveralls you wore was there any advertisement on it?

A. Well, there was the Alsco sign on the back, and then they had our name on the front.

Q. Who paid the rental and cleaning charges for these? A. We did.

Q. Did you pay a certain amount each week, or what? A. Yes, 72c a week.

Q. As I understand it, Alsco would purchase the materials that would go into a job?

A. That is right.

Q. And you furnished your own tools?

A. Own tools.

Q. On any jobs that you have been on, did Alsco furnish anything other than materials? [201]

A. Well maybe, yes, some tools that we didn't have and on certain jobs that we needed to have them.

Q. They furnished them?

A. We could get tools from Alsco, yes.

Q. Have you ever used any of Alsco's trucks?

(Testimony of George Aronson.)

A. Well, I did the first year or so I worked there.

Q. When was that?

A. Well, that was about '49 and '50, I think, that I used the company truck.

Q. And were you an installer at that time, too?

A. Yes, sir.

Mr. Lyman: Your Honor, I move that that be stricken, not being in the period involved.

The Court: No, I will let it stand.

Q. (By Mr. Ewing): As far as your pay is concerned, were you paid on any particular day?

A. No, you can get paid any time you finished orders.

Q. In other words, your pay was based on completion of a work order? A. That is right.

Q. On a cash transaction were there some cash transaction jobs that you bid on? A. Yes, sir.

Q. Did you collect the money from the customer upon completion of that job? [202]

A. That is right.

Q. Were you instructed to turn that money over to Alesco? A. Yes, sir.

Q. How were you paid, by check?

A. By check, yes.

Q. On jobs that you have done for Alesco, has there been more than one applicator on that job on occasion? A. There has at times, yes.

Q. Has Alesco ever split you applicators up and transferred one applicator to another job and retained one man on the original job?

(Testimony of George Aronson.)

A. I think there is one or two times that it has been done, yes.

Q. And you would complete the original job?

A. Either I would or the other fellow that was working on the same job would.

Q. So, of the two of you, one of you wouldn't finish that original job if you were transferred, is that correct?

A. Well, if we finished the other job first, we could go back on the one and help him finish up again.

Q. But say you and some other installer started a job, you stated at times Alsco split you up and one stayed on that job and the other one has gone to some other job? A. That is right. [203]

Q. Now, the one that went to the other job, did he ever return to the original job?

A. There is one occasion I remember, yes, we did.

Q. Has there been occasions when you already finished the original job and therefore there was nothing to return to as far as the second man was concerned? A. None that I can recall, no.

Q. In other words, the second man always returned to the original job?

A. Well, I couldn't rightfully say.

Q. But there were times when Alsco split you up? A. Yes, there has been several times.

Q. You say "several times"?

A. I think there is a couple of times that I can recall.

(Testimony of George Aronson.)

Q. Have you worked with new applicators at all, that is fellows that are new to that type of work?

A. They have sent guys out with me, yes, to learn the trade.

Q. Were you instructed to watch their work at all, or anything like that? A. That is right.

Q. Were you to report the progress of their work or their efficiency back to Alesco?

A. I have at times, yes.

Q. Did Alesco ever have any salesmen or other personnel [204] come out and check any job that you have been on?

A. There has been occasions they have, yes.

Q. Who would these people be that would come out?

A. Well, I have had salesmen come out and I have had, well, the manager.

Q. By "the manager," do you mean Mr. Lee or Mr. McFarlane? A. McFarlane.

Q. And when they were out there did they offer any suggestions or give any directions as to how the work should be done?

A. I believe that was a couple of times that that happened, yes.

Q. Would you follow those directions?

A. Yes, as close as possible.

Q. Did you feel that you were supposed to follow those directions?

Mr. Lyman: Objection, your Honor, there is entirely too much leading. I haven't objected up until now.

(Testimony of George Aronson.)

The Court: Sustained.

Q. (By Mr. Ewing): Now, these salesmen that came out and looked at your work, you say there have been times when they would tell you to do certain things?

A. They would suggest things, yes, to do.

Q. How would they frame their remarks to you, that is, what would they say to you? [205]

A. Well, now, that I couldn't rightfully remember, I mean.

Q. You say Mr. McFarlane has been out and checked jobs you have been on?

A. I think there is once or twice that he has, yes.

Q. Did he offer any comments or suggestions or directions?

A. Well, we tried to work out something that we could go ahead and do the job right, yes.

Q. Did you follow his directions?

A. I tried to, yes.

Q. Were you, as an applicator, ever taken off the job before it was finished and moved to another job?

A. There has been times, yes, I have.

Q. Have you always returned to the original job? A. Yes.

Q. Have there been times when you have had to go back and re-do jobs that were started by other applicators? A. Yes.

Q. What happened to that applicator who had originally done that job or part of that job?

A. Well, there is some of them that has stayed on, yes.

Q. Some of them that haven't?

(Testimony of George Aronson.)

A. Well, there might have been one or two, I wouldn't say for sure.

Q. Taking a person of reasonable experience as an installer, is it true that the job could be done with little supervision, [206] in other words, you have been with Alesco for some years, do you feel you can do your job without being told how to do it, for the most part? A. I think so.

Q. Could you use materials other than the ones that were furnished by Alesco?

A. There was times we had to get material, yes, that was furnished by Alesco.

Q. Where would you get it from?

A. Well, we would get it at the lumber yard.

Q. Did you contact Alesco first?

A. At times I would, and then if it was just some minor thing, well, I would just go get a piece of lumber and do so.

Q. As to extra work, how were you paid for extra work, on what basis?

A. So much per hour.

Q. And for work which was included within the work order, how were you paid for that?

A. Piece work.

Q. If you had to make a change in a job during the time it took you to make the change, how were you paid during the interval?

A. That would be extra labor.

Q. And you were paid by the hour for [207] that?

A. By the hour.

(Testimony of George Aronson.)

Q. As to minor changes, what do you consider minor changes? Let me put it this way: If the change involved any transaction involving money, more money or less money, would you contact Alsco first?

A. Yes.

Q. Have you been on any jobs where the home owner required some additional work done which was not included within the work order?

A. No, I never did do any additional work unless it was on the work order.

Q. Have you ever been requested to do so by a home owner?

A. We have been asked to, but then we never, I never have.

Q. Was there any reason for that?

A. Well, I didn't want to get involved in it, I guess.

Q. Have you been on jobs where a change had to be made in the work order?

A. Well, if there was mismeasured windows, yes.

Q. In reference to that change, would you contact Alsco first, before making any changes?

A. Oh, we would take the material back and have it changed, yes.

Q. Did Alsco ever furnish signs advertising their firm or product, on jobs that you have been on?

A. The only signs I have seen was when the work was going [208] on they would probably place a sign with "Alsco" on the property, I mean, as some advertising.

(Testimony of George Aronson.)

Q. They would have a sign out on the lawn, or something like that? A. Yes.

Q. Referring you to Defendant's Exhibit No. 9, which is a directive issued by Alesco on November 20, 1956, entitled "Code of Ethics and Cooperation," I will ask you, did you receive a copy of that (hands paper to witness)? A. Yes, I think so.

Q. And did you read it?

A. Well, I probably read part of it.

Q. Do you try to follow those things that are set out in these things?

A. Yes, I try to follow them as close as possible.

Q. On this page one, I notice on page two of Defendant's Exhibit 11 it says, "Do not fail to caulk all units that should be caulked," did you try to follow that as close as possible? A. Yes.

Q. And No. 2, "Do not try to cover up defective work product or work," did you try and do that as closely as you could? A. That is right.

Q. No. 3 says, "Do not leave out any pilot screws in two [209] lite windows for any reason," did you try and follow that? A. Yes, sir.

Q. As to the rest of them on here, 4, 5, 6 and 7, did you try and follow them as closely as you could?

A. Yes, I tried to follow everything that they had on there.

Q. Referring you to Defendant's Exhibit No. 11, which is another bulletin issued by Alesco, referring to Item 6 on this, it says, "Caulk around all windows, doors and other openings before installing sill, flashing strip or casing trim," did you do that?

(Testimony of George Aronson.)

A. Well, that is something I didn't have anything to do with, that comes under siding, I believe.

Q. That would be a siding installer?

A. That is right.

Q. Yes. A. On strictly windows and doors.

Q. Would most of these things on here apply to a siding applicator, as opposed to—

A. That is right.

Q. (Continuing): —as opposed to an installer? A. That is right.

Q. After completing a job, say an FHA job, was it necessary for you to get a certificate signed by the home [210] owner certifying that he was satisfied with the job?

A. Yes, he would look the job over and if he was satisfied, he would sign the completion.

Q. Have you been on jobs where the owner has not signed the slip? A. Yes, I have.

Q. And what would you do, then?

A. Well, I would bring it back into the office.

Q. And you would get the complaint straightened out with the office?

A. With the office and the customer.

Q. Did you always return to that job to finish it up?

A. Well, if there was something the customer didn't think he had gotten, well, we always went back and tried to get him satisfied so we could get our completion.

Q. I will ask you this: Have there been times when you have completed the work in the work

(Testimony of George Aronson.)

order and the customer has not signed it because of some oral agreement, possibly, that has been entered into between the salesman and the home owner? A. That I have, yes.

Q. And in reference to that work, did you have to do it?

A. Yes, we was compelled to do it, yes.

Q. That work wasn't in the work order, however, it wasn't set out in the work order, was [211] it?

A. Now, I don't quite remember on that, if it wasn't, then there probably was another order made up on it, then.

Q. How were you paid for that?

A. Well, if there was any more material to go on, why, it would be piece work or hourly wage.

Q. In the event it wouldn't involve materials, how would you be paid for it?

A. I don't quite get you?

Q. If this extra work that you had to do because of the agreement between the salesman and home owner did not involve any new materials but some other work which didn't involve new materials, how would you be paid for that work?

A. That would be an hourly basis.

Q. Do you have a contractor's card or tax stamp? A. No, I haven't.

Mr. Ewing: That is all I have.

(Testimony of George Aronson.)

Cross-Examination

By Mr. Lyman:

Q. Mr. Aronson, I believe you said you worked in the early years of 1948 to 1959; I mean, from the early years 1948 to 1958 for Alsco, is that correct?

A. I worked for them just about ever since they started in. [212]

Q. And do you recall that in the early years there that when you were working piece work on these windows that you would have extra work involving some carpentry to fit the windows properly?

A. That is right.

Q. And wasn't it the fact that back in the early years they asked you to just name your own price but keep it low, and you used to give them a flat figure for it, isn't that true?

A. No, there was always a set wage.

Mr. Ewing: I would object, your Honor. I would like a clarification of what he means by "early years"—'54?

Mr. Lyman: Well, is it your best recollection, then, that they always had this question of computing it by the hour?

A. It was hourly wages, yes.

Q. Now, when the hourly rates seemed a little high the company would take exception sometimes, wouldn't they, not with you, but with some of the applicators? A. That could be.

Q. You know of such instances, do you not?

(Testimony of George Aronson.)

A. It might have happened once or twice, I wouldn't say for sure.

Q. And then the applicator would negotiate with the company [213] or try to prove that he did put that time in?

A. Well, I don't know what the other guys have done.

Q. Did you ever hear about anything like that in all the years you were there?

A. Oh, I probably heard about it but never thought anything of it.

Q. Now, there was a time when you did leave Alesco, wasn't there?

A. Well, I left two weeks one time when my mother died.

Q. When what?

A. When my mother passed away.

Q. I don't mean that, sir, didn't you go into a gas station venture? A. No.

Q. Was that your brother, Walt?

A. That is my brother Walt, yes.

Q. Well, you were one of those persons that Mr. Lee and Mr. Williams said that was one of the regulars, you and I believe Lewis?

A. Yes.

Q. And when things were busy there would be a great influx of these installers that would come in, and applicators, is that correct?

A. That is correct.

Q. And they worked there under the same conditions that you [214] did? A. Yes, sir.

(Testimony of George Aronson.)

Q. Paid the same way? A. Yes.

Q. Had tools just like you did?

A. Yes, sir.

Q. And their hours were no different than yours?

A. Well, they kept their own hours.

Q. What I mean is that the company didn't tell them what time to start work and what time to quit?

A. They didn't tell any of us what time to start.

Q. And you who worked, as you say, steady, and they who worked intermittently, worked under the exact same conditions?

A. Well, when times were good and there was a lot to do, why, they hired more installers.

Q. What I am saying is that their conditions of work were the same as yours?

A. Yes, no different.

Q. Paid all the same?

A. Paid all the same.

Q. When you wanted to take off somewhere you certainly had a right to do it, without any question, didn't you?

A. When I wanted time off and they said "Yes," well, fine.

Q. I believe you said you were a person who never took a [215] vacation?

A. I never did.

Q. That is by your own choice?

A. That is right.

Q. Now, isn't it a fact that you put on literally hundreds of these jobs?

(Testimony of George Aronson.)

A. I put on a good many of them.

Q. And I believe you testified, it is true, is it not, that very few, in only a couple of instances, did somebody from the company come out?

A. Well, there has been a couple of instances that they have come out, yes.

Q. But in the great majority of these hundreds, or perhaps a couple of thousand cases, you have never seen anyone from the company?

A. Well, there has been salesmen out and looked them over, yes.

Q. Well, these salesmen have no technical knowledge of how to put on a window, do they?

A. Well, that could be.

Q. I am asking you, sir, do they?

A. Maybe they do.

Q. They never told you how to put on a window?

A. There is one guy that tried to tell me.

Q. But you didn't pay any attention to [216] him?

A. Well, I put it on the way he wanted it.

Q. Well, now, if a salesman came out and told you to put on a window the way you knew it was wrong—

A. If he wanted it on that way, I would put it on that way.

Q. Then you would have to go back and do it over?

A. At times, well, at his expense, yes.

Q. At whose expense?

A. At the salesman's expense.

(Testimony of George Aronson.)

Q. Supposing the salesman wouldn't pay you, then whose expense would it be?

A. Well, I wouldn't put it on.

Q. Well, in other words, if you knew as an applicator of many years experience that it was wrong to put it on that way?

A. No, but if the salesman requested it put on that way, I would put it on that way.

Q. Even though it was wrong?

A. Yes, sir.

Q. Do you know of any other applicator that would do that?

A. I think any of them would.

Q. Do you know of any other applicator that has done it? A. No, I don't.

Q. Have you ever knowingly put on a window wrong? A. No, not to my knowledge.

Q. And Mr. McFarlane has no technical knowledge of this [217] business at all, does he?

Mr. Ewing: I object, your Honor, as being a conclusion of the witness.

The Court: Just a moment, sustained.

Q. (By Mr. Lyman): As a matter of fact, Mr. McFarlane has no technical knowledge of any type of business, has he?

Mr. Ewing: I object again.

The Court: Sustained, how would he know?

Q. (By Mr. Lyman): Do you know whether he has any technical knowledge?

A. I imagine he does, he has been in it quite a while.

(Testimony of George Aronson.)

Q. Have you ever seen him put any windows on? A. No, I haven't.

Q. Do you know of any supervisors that are hired for the specific purpose of going out and supervising the men? A. No, I don't.

Q. You heard the testimony of the other applicators, Mr. Lewis and Mr. Green, are they correct when they said no one supervises them and tells them how to do the work?

Mr. Ewing: I object, your Honor, I don't think this witness knows what other installers might do.

The Court: Sustained.

Q. (By Mr. Lyman): Did you hear the testimony of Mr. [218] Green and Mr. Lewis?

A. Yes, I did.

Q. And did you hear them state that no one told them the manner and method in which these windows should be put on, do you recall them making the statement?

Mr. Ewing: I object, your Honor, I don't think he said that statement.

Mr. Lyman: I asked the question specifically.

The Court: Overruled.

Q. (By Mr. Lyman): Do you recall that?

A. No, I don't.

Q. You were sitting here during the proceedings, were you not, sir? A. Yes, sir.

Q. These bulletins, do they tell you "Caulk around the windows and doors and other openings

(Testimony of George Aronson.)

before installing sill and flashing strip and casing trim," that is part of the job, isn't it?

A. Not in my windows, that is in a siding setup.

Q. Well, where counsel was asking, "Do not fail to caulk all units that should be caulked," would you leave them empty simply because you hadn't read this? A. Oh, no.

Q. You would do it, anyway, wouldn't you?

A. Well, it's part of the windows. [219]

Q. In other words, you didn't need this written material to tell you to caulk where you should caulk? A. I didn't need it, no.

Q. And if Alsco failed to print this and distribute it, you would caulk your openings, would you not?

A. That is what we was instructed to do when we first started putting the windows in.

Q. And that is the proper way to complete a contract, isn't it?

A. I imagine it would be.

Q. Well, isn't it a fact that the company's interests in this insofar as you were concerned was that you should complete this job in accordance with its contracts with the customer, isn't that true, they wanted a good, workmanlike job from you, isn't that true? A. That is right.

Q. And no one came out there and told you which windows to put on first or which door to put on first, did they?

A. No, but it was wrote on the contract which

(Testimony of George Aronson.)

one was to be put on first, or second, or third, or fourth, which was the one.

Q. Well, couldn't you put a door on first if you wanted to?

A. I could have if I wanted to, if there was a door to be put on, yes.

Q. Let me understand you about these contracts, these [220] openings have numbers, is that correct? A. That is right.

Q. And you can put any windows on first, could you not, it wouldn't make any difference?

A. The windows are numbered.

Q. Pardon?

A. The windows are numbered.

Q. And they are put in the truck in that order?

A. Oh, no, they are put on the house in that order.

Q. Would it make any difference whether you put a window on the side of the house or in the front of the house first?

A. Well, it probably wouldn't, but then we go by the numbers so that when the customer takes his windows out he knows which window goes back in again, for cleaning.

Q. Yes, I know that, the windows are numbered so that when they store them they can fit them back into the proper opening?

A. That is right.

Q. But as far as you are concerned, would it make any difference if you started on the second

(Testimony of George Aronson.)

floor and put the proper window in the proper hole, would it make any difference?

A. No, it wouldn't make no difference, no.

Q. And if the lady of the house was busy down-stairs and [221] didn't want you downstairs, and told you to go upstairs and put the windows in up there first, well, you could do that, couldn't you?

A. Yes, we could.

Q. And you have done it, have you not, sir?

A. Well, I couldn't say for sure.

Q. It says, this bulletin, "Do not try to cover up defective product or work," well, you wouldn't do that anyway, would you?

A. Well, I would sure try not to.

Q. And you didn't need this printed matter here to tell you that, did you, you know better, isn't that true? A. It could be.

Q. Well, sir, I would like to know, do you know better than to try to hide work?

A. Well, I hope so, yes.

Q. You clean your windows, do you not, before you install them? A. That is right.

Q. Take pride in your work?

A. That is right.

Q. And you also make appointments with customers to see that they are going to be home?

A. Call them before I put the windows in, yes.

Q. And you get a group of orders from the shop, you are the [222] one that makes the appointments with the customers, are you not?

A. At times we do and at times we just take

(Testimony of George Aronson.)

off on a job and people are home and we go ahead with them, we don't necessarily have to call them.

Q. What I am trying to say is that the company doesn't line up the appointments and hand you a schedule which you have to follow?

A. They do pretty well.

Q. Pardon?

A. Yes, they line them out for us quite very much.

Q. Did Mr. Williams ever put a schedule out for you and tell you, "You have to take them in this order"?

A. Well, now, if there is an order that is rush, he will write "Rush" on that order and "To be put on first."

Q. You put that on first?

A. That is right.

Q. What about the second? Did Mr. Williams tell you which one you put on second?

A. I have had quite a few times that he has wrote which ones should be on first, second and third.

Q. And on up to the end, is that right?

A. That is right.

Q. Did you hear Mr. Williams testify here that you people make up your own schedule? [223]

A. I couldn't rightfully say I did.

Q. Well, you were here this afternoon?

A. That is right.

Q. Did he make up schedules for anyone else besides you?

(Testimony of George Aronson.)

A. Well, that is something I don't know, sir.

Q. You are the only one, as far as you know, that he makes up a schedule for?

A. He might have made a schedule up for others.

Q. Does he do this with every job, he schedules every job for you?

A. No, not unless it's rush.

Q. And let's say this is an ordinary group of orders and there is no rush involved at all, just a routine group of four orders. A. Yes.

Q. Does Mr. Williams every time on these thousands of jobs that you have done, give you a list that you have got to follow in any particular order? A. Not at all times, no.

Q. No. When there is a rush job he asks you to do this rush job first?

A. Yes, he will mark "Rush" on my order.

Q. Right, because a customer will cancel out and you will lose your earnings, won't you?

A. Right. [224]

Q. As a matter of fact, he doesn't care which job you do after that, does he?

A. No, I don't imagine he would.

Q. All right, here is a statement in this bulletin, it says, "Your attitude with the customers must be one of cooperation, friendliness and cheerfulness," you wouldn't be any other way, would you?

A. At least I try to be decent to people, yes.

Q. You don't need this bulletin to remind you

(Testimony of George Aronson.)

of that, do you? A. No.

Q. It says, "Present a neat appearance at all times," you don't need Alesco to tell you that, do you? A. I hope not.

Q. Now, Mr. McFarlane asked you to put a sign of Alesco on your truck and you said "No," isn't that true? A. That is right.

Q. You still worked there, didn't you?

A. Yes.

Q. Pardon? A. Yes, sir.

Q. Now, isn't it a fact that while you were at Alesco that the rates that were paid for these windows changed from time to time per unit?

A. There is one time that they have changed, as far as I know [225] now.

Q. You recall once? And that is at the request of the installers, was it not, they wanted more money? A. Yes, I imagine it was.

Q. And you were among those installers?

A. Pardon?

Q. You were one of those installers?

A. Yes, but I don't think I ever sat in on the meeting, when they had the meeting I think I was out of town.

Q. When you came back you were getting more per unit? A. Yes.

Q. Now, wasn't there a different amount that was paid if you went up above the first floor, for instance?

A. Yes, they did add a little bit to the second floor.

Q. Counsel questioned you about being split up.

(Testimony of George Aronson.)

the team being split up, who would the man be that you would usually go with?

A. Well, I have gone with Lewis, I have gone with Busby.

Q. And those would usually be good-sized jobs with a number of windows, wouldn't they?

A. Correct.

Q. And the purpose was that you could put more windows on more quickly if you had two men rather than one?

A. Yes, and then if we had to go up quite a ways with them, why, it would take two of [226] us.

Q. Yes, and then you were paid according to the number of units you put on?

A. That is right.

Q. Now, when you brought the sheet back, who would decide which ones got paid how much?

A. It was split down the center.

Q. You had your own tools, did you not?

A. Yes, sir.

Q. Furnished all your own tools and maintained your car? A. That is right.

Q. Or your truck, that is, and you paid all your own expenses incident to this work out of your gross receipts? A. That is right.

Q. Was there anything in your arrangement with Alsco that you were guaranteed a certain number of jobs? A. No, sir.

Q. And did you ever at any time ever promise

(Testimony of George Aronson.)

them that you would do a certain number of jobs a year? A. No, sir.

Q. Pardon? A. No, sir.

Q. Now, counsel asked you if all these jobs that you did, whether you required supervision, I believe you answered you didn't, is that correct?

A. I think so. [227]

Q. And that is because you are experienced in this work, isn't that true? A. That is right.

Q. And the company relies upon your experience and your ability to do a workmanlike job, isn't that right? A. That is right.

Q. And you know when you come in with a completion certificate or you tell them the job is completed they are satisfied, isn't that true?

A. That is right, I hope so.

Q. And upon that representation to them, you get paid, isn't that right? A. That is right.

Q. Pardon? A. That is right.

Q. So any contact that anyone from the office had with you on these jobs concerned a customer complaint, as a rule, did it not?

A. I don't rightfully know.

Q. Well, men would come out on the job because some customer complained, is that the reason they came out? A. Could be, yes.

Q. And it was the purpose of the company, was it not, to create good customer relations, isn't that true? A. I reckon so. [228]

Q. And whenever the customer was critical, why they tried to satisfy the customer by asking you

(Testimony of George Aronson.)

to do this particular work for the customer, wasn't that so? A. That is right.

Mr. Lyman: I believe that is all, your Honor.

Redirect Examination

By Mr. Ewing:

Q. Referring to Defendant's Exhibit No. 9 again, "Code of Ethics and Cooperation," is it true that irregardless of what they say in here is right or wrong, did you try and follow what they say in here?

A. I tried to follow what they said, yes.

Q. Is there any connection between this presenting a neat appearance and wearing white coveralls? In other words, is it in your mind when you present a neat appearance you were to wear these coveralls furnished you?

A. Well, would I have to wear them or wouldn't I have to wear them?

Q. Well, they talk about presenting a neat appearance at all times in this Code of Ethics here, to you would that mean wearing these coveralls, and so forth?

A. Well, I reckon so, yes.

Mr. Ewing: That is all I have.

The Court: That is all, Mr. Aronson, step [229] down.

The Witness: Thank you.

Mr. Lyman: Oh, just one question, if I may, your Honor.

(Testimony of George Aronson.)

Recross-Examination

By Mr. Lyman:

Q. When you and Mr. Busby got into this job, wasn't it your selection of Mr. Busby or your selection of Mr. Lewis? A. No.

Q. Or Mr. Lewis selected you or Mr. Busby selected you? A. No.

Q. Well, how was it done?

A. We was asked by the company.

Q. And who asked you, if I may ask?

A. Well, now, I don't rightfully recall who asked us, but we was asked.

Q. Well, there are only two people who could ask you, either Mr. Lee or Mr. Williams; now which of those asked you?

A. I believe it was Mr. McFarlane.

Q. The man that is not here? A. No.

Q. And you have worked with Mr. Busby on several occasions, have you not?

A. Yes, I worked with him. [230]

Q. And you worked with Lewis on several occasions, isn't that true? A. I guess so.

Q. And isn't it a fact that after the first time, at least, it was the result of your own selection or his selection that you two got together?

A. Well, I haven't worked very much with anybody, I have been a lone wolf all the time, practically. [231]

* * *

CLARENCE LLOYD BUSBY,
called and sworn as a witness on behalf of the defendant, testified as follows:

Clerk of the Court: Please state your full name?

A. Clarence Lloyd Busby.

Clerk of the Court: How do you spell that Busby?

A. (Spells.) B-u-s-b-y.

Clerk of the Court: Thank you, please be seated.

Direct Examination

By Mr. Ewing:

Q. Mr. Busby, what is your address?

A. 711 S. Cowley, 7-1-1.

Q. And are you working at the present time?

A. No, between jobs. [232]

Q. Have you at any time worked for Alsco Storm Windows Co. or Alsco Company Northwest, Inc.? A. Yes.

Q. And when was that?

A. It was several times, you might say in and out from 1949.

Q. Since 1949? A. Since 1949.

Q. Up to what time?

A. Up to, oh, '59.

Q. In what capacity did you work for that company? A. As an installer.

Q. Generally working as an installer, what did you do?

A. Well, it was our place to take windows,

(Testimony of Clarence Lloyd Busby.)

doors and siding out and install it on the homes where they directed.

Q. Was there any written contract between you and Alesco that you know of? A. No.

Q. Did you perform your work on the basis of work orders? A. Yes.

Q. And where were they picked up at?

A. They was picked up, generally, right at the plant.

Q. Were there any conversations or negotiations entered into between you and the representative of Alesco at the time you picked up your work orders?

A. Well, generally on how many jobs he is going to take out [233] and such as that.

Q. Did Alesco give you the work orders?

A. Yes, we was handed a certain amount of work orders.

Q. Well, were you free to accept or reject any work order that was offered to you?

A. Well, I would say that you would be free to object to any one.

Q. Have you ever rejected a work order given you? A. I have, yes.

Q. And what would follow after that rejection?

A. Well, generally a better working condition due to the fact that the only reason I rejected it was because of an area, or something like that, which was generally seen, and after negotiation.

Q. Did Alesco ever give you more than one work order at a time? A. Oh, yes.

(Testimony of Clarence Lloyd Busby.)

Q. Did they attach any priority to these orders?

A. Oh, quite often.

Q. What do you mean by that, would they tell you which ones to do first and second, and so on?

A. Well, from two different ideas, one would be an order that was older than another order should naturally come first.

Q. Would they tell you to do that first? [234]

A. Well, that would be a general—it would be an understood order, yes.

Q. Has there been any times when you have gone to Alsco looking for work when they did not have a job for you? A. Oh, yes.

Q. Not having a job for you at those times, did they refer you to a competitor? A. No.

Q. Did Alsco discourage you at all from working for competitors when they did not have a job for you?

A. I think that there was a definite feeling in that direction, yes.

Q. Well, can you explain that?

A. Well, if you should go to work for somebody else you was naturally set down.

Mr. Lyman: Objection, your Honor, this kind of testimony is conjectural.

The Court: I don't think it's responsive.

Mr. Lyman: Pardon me?

The Court: I don't think it's responsive.

Mr. Lyman: That is right.

The Court: Sustained.

(Testimony of Clarence Lloyd Busby.)

Q. (By Mr. Ewing): Has Mr. McFarlane ever called you into his office at all?

A. Oh, yes, I have been there quite often. [235]

Q. And what was that in reference to?

A. Well, several different things, at one time he seen our trucks, I was with Mr. Lewis, and he seen our trucks setting at a competitor's place, and he definitely told us that we wasn't loyal to the company.

Q. You were called into Mr. McFarlane's office as a result of somebody seeing your truck?

A. That is right.

Q. Were you doing a job for Alesco at that time? A. We were not.

Q. Did you have any Alesco materials on your trucks? A. We did not.

Q. Did you, as an installer, Mr. Busby, ever hold yourself out to the public as being in the business of an installer, have you ever advertised that you were in business?

A. No, no advertising.

Q. And you stated you did own a truck at the time in question? A. That is right.

Q. Did you advertise at all in the truck?

A. No.

Q. Or in papers? A. No.

Q. The phone book? A. No. [236]

Q. Were you at any time approached to advertise Alesco on your truck? A. Oh, yes.

Q. And would you relate that incident, please?

(Testimony of Clarence Lloyd Busby.)

A. Well, they asked us if we wouldn't allow an Alsco sign to be put on our trucks, and we refused.

Q. You refused? A. Yes.

Q. Who furnished the materials for these jobs?

A. Alsco, the main plant.

Q. Have you ever used Alsco's trucks?

A. Oh, yes.

Q. On jobs you have done for them?

A. Yes.

Q. Have they ever furnished you anything else in the way of equipment?

A. Oh, quite often an extra long ladder for higher staging, or a saw, larger saw than what we was generally packing in our small tool kits, things of that kind.

Q. Have they ever furnished you any jacks?

A. No, generally we all had our own jacks.

Q. And have they ever furnished you any scaffolding?

A. Well, the ladders was used for scaffolding.

Q. In the event you broke a tool in the course of doing a job, who would replace that? [237]

A. Generally, we did.

Q. And were you reimbursed for that at all?

A. No, that was our own.

Q. As to work which was included within a work order, what was the basis for payment to you for that work?

A. Well, I would say piece work would be the ruling.

(Testimony of Clarence Lloyd Busby.)

Q. Were there times when you did extra work, that is, work outside of the work order?

A. Oh, yes.

Q. And how were you paid for that work?

A. Generally, by the hour.

Q. Have there been occasions when changes had to be made in the job?

A. Yes, there have been occasions of that.

Q. Could you make changes in a job without consulting Alesco first?

A. Very minor ones we could handle, but all the important ones had to be discussed with the office.

Q. Have you ever been moved off a job before it was finished, to another job at the direction of Alesco personnel? A. Oh, yes.

Q. And you would then start a second job at a different location? A. Yes.

Q. Were you always returned to the job that you started? [238]

A. Sometimes; sometimes, no.

Q. Are you saying that there have been times when you started a job, were removed to a second job and never returned to the job you originally started? A. That is right.

Q. Who would finish the job you originally started? A. Generally, another installer.

Q. And were you paid piecemeal for the work you had done on the first job, I mean, to the extent you went?

(Testimony of Clarence Lloyd Busby.)

A. To the extent you went, it was generally a piecemeal situation.

Q. And then, of course, you would be paid on a unit basis on the second job you went to?

The Court: When you say "piecemeal," you mean piece work?

Mr. Ewing: Piece work, or a unit price.

Q. (By Mr. Ewing): To an experienced installer such as you, Mr. Busby, was it necessary to have close supervision?

Mr. Lyman: Exception, your Honor, this is leading, and calls for a conclusion.

The Court: Sustained.

Q. (By Mr. Ewing): Could you do your work without close supervision?

Mr. Lyman: Objection, your Honor, the same thing.

The Court: It calls for a conclusion, you can ask [239] him what happened.

Q. (By Mr. Ewing): During the course of working on a job, would any representatives from Alsco come out to check that job?

A. I would have to say yes.

Q. Who were they, do you know?

A. In most cases it would be a salesman or a dealer.

Q. Have these salesmen that have been out on jobs you have been on made any suggestions or given any directions to you as to how the work should be done? A. Oh, yes.

(Testimony of Clarence Lloyd Busby.)

Q. Would you explain that, what would they say to you?

A. Quite often it was a question as to the manner you were carrying your job on, if you really thought that was proper.

Q. Did you follow the directions or suggestions that these people gave you?

A. Absolutely.

Q. After a job was done, were you to get anything signed by the customer certifying that the job was done, that he was satisfied with the job?

A. Yes, it was either completion or cash.

Q. Have you been on jobs where the customer was not satisfied and would not sign the completion slip? A. Oh, yes. [240]

Q. And what would be the reason for the customer not signing, any specific reason?

A. Oh, it was a matter of several things.

Q. And if a customer had a complaint, is it true that you would take that complaint to Alesco and tell them what the trouble was and why the customer would not sign the slip?

A. That is right.

Q. On those occasions have you always been returned to that job to finish up that job in accordance with what the customer wanted?

A. Not every occasion, no.

Q. Where would you go?

A. Generally, if we did not go back, we would go on other work.

(Testimony of Clarence Lloyd Busby.)

Q. In other words, you were available to go back to that job, but outside of the fact that——

Mr. Lyman (Interposing): Objection, your Honor, he hasn't said that.

The Court: Sustained.

Q. (By Mr. Ewing): Did you say that there have been times when you did not return to the job that you started after registering the complaint with Alsco? A. That is right.

Q. When somebody else finished that job? [241]

A. Generally.

Q. Have you ever entered into a separate contract with the home owner arising out of some job that you were doing for Alsco? A. No.

Q. In the course of your employment with Alsco were directives or bulletins ever issued to you?

A. Oh, yes.

Q. Referring you to Defendant's Exhibit No. 9, being a Code of Ethics and Cooperation, issued by Alsco on November 28, 1956, do you recall receiving that bulletin (hands paper to witness)?

A. Oh, yes, I believe I do.

Q. Did you read it when you got it?

A. Oh, yes.

Q. Referring to page two on this bulletin, at Point 1 here it says, "Do not fail to caulk all units that should be caulked," did you follow that?

Mr. Lyman: Objection, your Honor, as leading. He ought to ask him what he did with respect to these things and let the witness discuss it.

The Court: Sustained.

(Testimony of Clarence Lloyd Busby.)

Q. (By Mr. Ewing): In reference to No. 1 here, "Do not fail to caulk all units that should be caulked," have you followed that? [242]

Mr. Lyman: Objection, your Honor.

The Court: Sustained.

Q. (By Mr. Ewing): Will you state whether or not you have followed the directions set out in this Code?

Mr. Lyman: Your Honor, objection for the same reason.

The Court: I think I should sustain the objection, he can ask him what he did, but you are giving him the answer, Mr. Ewing. Sustain the objection.

Mr. Ewing: I can ask him, did he follow these directions, can I not?

The Court: No, you are asking him a leading question, you are giving him the answer. What you should do is, what did he do about those things, you can ask him that but you can't tell him what to answer, that is a classical leading question. He is your witness, counsel.

Mr. Ewing: Yes, sir.

Q. (By Mr. Ewing): Referring to Points 1 through 7 here on page 2 of this exhibit, what did you do in reference to those points that are set out in there?

A. Well, we definitely followed them because they was put there for our sake.

Q. Outside of this written bulletin that was issued to you, have there ever been any oral meetings at Alesco? A. Oh, yes. [243]

(Testimony of Clarence Lloyd Busby.)

Q. And what was discussed at these meetings?

A. Mostly it would be arbitration on working conditions, pay raises, and, oh, it was just a general work program in some cases.

Q. Taking Exhibit No. 9 here, Point No. 1 here was, "Present a neat appearance at all times," what would you do in reference to that particular point?

A. Well, we tried to follow it. One of the ways we tried to follow it is by, it was a very dirty job, I mean aluminum is black, consequently a boy in the field could become very dirty very easily, and it was hard to keep your appearance up in a neat manner. Therefore, the biggest share of us found it was easier and better to wear white coveralls because they, in turn, even though they were dirty, they were still a neat, workable uniform.

Q. Were you requested to wear these overalls?

A. As a direct order, no.

Q. Did these coveralls have any advertising on them? A. Yes.

Q. And what was inscribed on them?

A. Generally, "Alesco Northwest" on the back, and your first name on the front, above the left-hand pocket.

Q. You say they never gave you a direct order to wear these; I will ask you, did they ever request you to wear them? [244]

Mr. Lyman: Objection as leading, your Honor.

The Court: Sustained.

Q. (By Mr. Ewing): Who paid the rental and cleaning charges on these coveralls?

(Testimony of Clarence Lloyd Busby.)

A. We generally did, most of the time.

Q. Did you have a contractor's card or a tax stamp? A. No, I did not.

Mr. Lyman: Your Honor, I want to object to that as immaterial as a matter of evidence because it has nothing to do with determining the definition of a master and servant in the common law sense.

The Court: Well, it has something to do with determining whether he is an independent contractor, he is either one or the other, isn't he? [245]

* * *

The Court: Did you want to strike the last answer?

Mr. Lyman: Yes, your Honor.

The Court: It's immaterial and hearsay.

Mr. Lyman: It's immaterial, I am sure that I can persuade the Court, and there is no question as far as the record is concerned.

The Court: If he did have a tax stamp and was an independent contractor and held himself out as such, don't you think he would be entitled to show that?

Mr. Lyman: I don't think it would make any difference.

The Court: Why not? That is exactly what you are trying to show that he is an independent contractor, aren't you?

Mr. Lyman: Well, yes, but we are trying to show that they are not employees within the master and servant doctrine.

(Testimony of Clarence Lloyd Busby.)

The Court: That is true, you don't take any one thing under the present cases, even all those cases that you have been in, as the general situation.

Mr. Lyman: That is correct, your Honor. In other [247] words, if you had a close situation where there were obvious elements of control where they had supervisors breathing down their necks, then I would say if you had a tax stamp that may weigh very heavily against the employer and employee relationship, but where we have this obvious freedom here which has come out so far, this tax stamp is evidently being sought by the Government as a strong point to overcome all of these factors.

The Court: I think probably you had better wait to argue the case until the testimony is all in, hadn't you?

Mr. Lyman: Very well, your Honor.

The Court: In view of your position that you say that this is not in any manner controlled by the state law and the tax stamp has no particular materiality, with which I am inclined to agree, which may apply, because we don't determine this by the statute, the law by the particular section of the statute involved, I will strike that portion of the testimony. Did you have something further?

Mr. Ewing: I am through with him.

(Testimony of Clarence Lloyd Busby.)

Cross-Examination

By Mr. Lyman:

Q. Mr. Busby, these meetings that you just mentioned, that is, where the question was raised as to the situation that you were not getting enough money per unit, [248] per window, isn't that true, didn't they try to get more money per window at these meetings, the applicators?

A. That was part of it, yes.

Q. And you had some negotiations with the officers of the company and I believe you did get some increase in the unit rate, did you not?

A. That was part of it, yes.

Q. And then there were also discussions, were there not, that extra work was coming in a little too heavy and they wanted you to watch it, that perhaps all this extra work wasn't being done as you were claiming, wasn't that part of the discussion? A. That is right, pro and con.

Q. And at these discussions the company said that, "We have no way of checking these hours that you give us," isn't that true, "We rely on you"? A. That is right.

Q. And a lot of controversy arose because many installers were bringing in extra work in amounts which seemed a little unreasonable, wasn't that one of the complaints?

A. That was one of the complaints.

Q. So then the company decided "you had bet-

(Testimony of Clarence Lloyd Busby.)

ter prove the number of hours you do, somehow, so that we can arrive at some fair result," wasn't that part of the conversation, [249] also?

A. That was, but it was very innocuous.

Q. There was a little emphasis on this extra work? A. Yes, that is true.

Q. Now, these bulletins that were put out, you would normally do these things, anyway, on a job, wouldn't you, like caulk your windows?

A. I would have to say some of them, some of them, no.

Q. You mean you would leave a space in there?

A. I think that I would have to truthfully answer that by saying that since we was piece workers our income is based entirely on how fast we can put a unit in, and every other one of these things enter into the picture, has a tendency to tear that down, neat appearance would be one of them, on down the line, would definitely have a program of tearing your speed down to a certain extent, that is the way I would have to answer that.

Q. I see. All right, sir. Well then, you are saying, then, that you would omit caulking; wouldn't that tend to violate the contract that you had to do a workmanlike job?

A. I will have to omit the caulking on, like I say, a part of them.

Q. I see.

A. But the caulking one is a part of the efficiency and we [250] tried to do our work efficiently.

Q. Because if you don't you are going to have

(Testimony of Clarence Lloyd Busby.)
to go back and do it over again, and that is going
to be a bigger waste of time?

A. That is right, loss of money again.

Q. And you don't want to waste time on these
jobs? A. That is right.

Q. So actually, when they tell you to do certain
things or remind you to do certain things which
are part of the job, anyhow, you would do them
without any written instructions, wouldn't you,
like caulking?

A. Caulking would be one of them, yes.

Q. I think they have one in here about "Don't
leave out a pilot screw in a two lite window for
any reason," do you know what that means?

A. I do, but I am afraid I cannot answer that
because it is too long a story.

Q. Well, if you left out a pilot screw, why you
wouldn't have completed your contract, would you?

A. In some cases I would have to say yes, in
some cases I would have to say no.

Q. You heard Mr. Williams say it is like leav-
ing a headlight off a car.

A. That is right, but sometimes the headlight
left off the car is proper if the condition happens
to be right. [251]

Q. If you leave the headlight off the car and
you have paid for headlights, then you don't have
a complete car, do you?

A. That is very true.

Q. All right. And then when it says, "Pick up

(Testimony of Clarence Lloyd Busby.)

the completion or the cash," why, that is necessary anyhow, that is how you get paid, isn't it?

A. That was, I understood it that that was one of the ways that they could, in turn, pay us.

Q. All right. Did you ever get in a situation where a home owner might ask you to do some little thing, hang up a clothesline or build a shelf for her? A. Well, not so much that, no.

Q. Well, I mean some minor work, I don't mean anything major.

A. They have asked considerable times about a thing that you have not mentioned, which I did not do.

Q. I don't know, what would that be; in other words, you didn't engage in any extra work with these home owners? A. No.

Q. You wanted to get your job on and get away?

A. That is right.

Q. Now, you did a great number of jobs for Alsco during the time that you were in and out, did you not, sir? A. Quite a few, yes. [252]

Q. And it was on very few occasions that a salesman would come out, haven't they, isn't that so?

A. Well, I would say that they was, more than fifty per cent of the time that there was a salesman there.

Q. All right. Now, this salesman would complain about the extra work that you were putting in, would he not, that would be his problem with you?

(Testimony of Clarence Lloyd Busby.)

A. Well, that didn't concern me near as much as his presence, being there, no.

Q. Well, did he ask you to look out for leads for him for other jobs? A. Oh, yes.

Q. And he would develop customer relations with the customer, too, at the same time, wouldn't he? A. That is right.

Q. And he was looking for other jobs in the neighborhood when he was talking to you?

A. That is right.

Q. And if he had mismeasured that job in any way and you had to do extra work, he saw he was going to lose part of his commission, isn't that true?

A. That is right.

Q. And that is where you would get in an argument with him sometimes, isn't that so?

A. Well, very seldom we ever got in an argument because we [253] generally knew more than he did about the work, very seldom would they give you an argument.

Q. In other words, he didn't have the technical knowledge of the work that you did?

A. No.

Q. You just listened and then would be pleasant about it? A. That is about the size of it.

Q. And then when he said what he had to say and left, why, you were happy he left?

A. Yes.

Q. Now, this situation of moving from one job to another, now, let me understand that, sir. You

(Testimony of Clarence Lloyd Busby.)

would have a group of orders, say four or five, when you leave the shop, would you not, sir?

A. Yes, sir.

Q. And then you would start putting up some windows in a particular place, and then you may get a call that there is a rush order, somebody is going to cancel if we don't get it up today, did you get that, sir?

A. That is right, I am following you.

Q. I just wanted you to answer for the record.

A. Yes.

Q. Then that job would be yours, wouldn't it, the rush job?

A. The rush job that I am to be moved onto.

Q. That is right. [254]

A. After I picked it up that work order would be considered mine, right.

Q. And if your first customer was in no particular hurry, you could go back and finish that first one, could you not? A. That is right.

Q. And you often did?

A. Often we did.

Q. And then you had both of them, you were paid on both? A. Yes.

Q. Did you ever work with somebody, together, I don't believe you testified that you did, the two of you together on a job?

A. You mean, two installers working together?

Q. Yes. A. Quite often.

Q. Well, how many jobs would that be, a regular thing or an unusual thing?

(Testimony of Clarence Lloyd Busby.)

A. Well, I would say neither.

Q. That would be a larger job, would it not, like a hospital or apartment house?

A. A hospital, a larger unit deal, a real large window would cause a real rough condition on one man, consequently, it would become a very small problem with two different crews. [255]

Q. I see. So then two of you would go out and do this larger job, isn't that correct, sir?

A. That is right.

Q. And then you would decide between yourselves how the compensation or the pay should be divided?

A. Well, that would be generally understood, you know, before we left.

Q. I mean, you decided between yourselves?

A. Yes.

Q. Now, that little incident you discussed where I believe you and Lewis were called in by Mel McFarlane? A. Yes.

Q. That was during a rather busy time, was it not, Alesco had a lot of orders going?

A. No, at the time it wasn't too busy, I would say it was just a medium time.

Q. Well, Mel McFarlane said something about loyalty to the company, did he use that word?

A. That is the word he used.

Q. And he didn't offer you any pay or any incentive to stay with Alesco, did he?

A. No, definitely not.

Q. Just conversation at that time?

(Testimony of Clarence Lloyd Busby.)

A. It was conversation on his part as a boss, yes.

Q. Now, you didn't have any arrangement with Alsco that you [256] were going to do a certain number of jobs for them for a certain number of months or weeks, did you, nothing in your arrangement with them like that, was there?

A. No, neither written nor oral.

Q. And they didn't tell you they were going to give you a certain number, either? What I mean is, over a long period of time?

A. No, I would say not over a long period of time.

Q. In other words, you have got a group or one or two in a certain day, and that would be your work for that particular period, isn't that correct, sir? A. That is right.

Q. And each of these work sheets that you received and this being a typical one which is in evidence here, Plaintiffs' Exhibit 6, is that typical of the work orders that you received (hands paper to witness)?

A. Yes, that is typical of one of the work orders.

Q. Now, you would be paid, would you not, on the basis of the work set out in that work order?

A. That is right.

Q. And if on the back you indicated you had some extras, why, you would indicate it on the back like that "Extra labor, \$3.50," is that correct?

(Testimony of Clarence Lloyd Busby.)

A. That is right, except it was always my understanding that there would be no extra labor paid unless it was shown by [257] the hour.

Q. Okay, but that one is not by the hour, is it?

A. Possibly they just missed it there, or something, I can't say; this is not mine.

Q. Each of those work sheets determined your particular pay for that particular job?

A. That is right.

Q. And you work on a job basis for Alesco, did you not? A. That is right.

Q. I believe you have testified that you came in and went out several times, did you work for other companies in similar businesses?

A. Not so much other companies as I did for the parent companies, dealers. I have more time in than any of the rest of the installers, I believe, in the parent companies' dealers.

Q. You would work with their dealers?

A. That is right, which is actually working for the company but is working for one of the dealers.

Q. But the dealer paid you?

A. The dealer paid me. In other words, I was working with the same identical material.

Q. But you were paid by a different person?

A. Paid by a different outlet.

Q. Then you would come back and work for Alesco Northwest, [258] and then go off again?

A. That is right.

Q. Now, let me ask you, you said a dealer would

(Testimony of Clarence Lloyd Busby.)

often come out to a job, did I understand you to say that? A. That is right.

Q. You mean, a dealer would come out to a job you were doing for Alsco?

A. No, no, a dealer would come out to the job that was his, let's put it that way.

Mr. Lyman: I believe that is all, your Honor.

Redirect Examination

By Mr. Ewing:

Q. You stated, Mr. Busby, that there has been jobs where more than two applicators were on that job? A. Yes.

Q. Two or more? A. Yes.

Q. Has Alsco ever split those installers up and sent one to one job and continued the other one on the original job?

A. Oh, I would say so, yes.

Q. Has that happened on jobs you have been on?

A. Well, I am sure it has, although I could not pinpoint any one instance. [259]

Q. I think you stated that less than 50% of the time that sometimes salesmen would come out on the job? A. Oh, yes.

Q. Would they ever tell you to do something?

Mr. Lyman: Objection, your Honor, as leading.

The Court: Overruled.

(Last question read.)

A. Well, quite often.

Q. (By Mr. Ewing): Would you do it?

A. In cases where I felt I was the controlling judge on it, I would do so.

Mr. Ewing: That is all I have.

Mr. Lyman: Nothing further, your Honor.

The Court: That is all, Mr. Busby.

(Witnessed excused.)

Mr. Ewing: I am through, your Honor.

The Court: Does the Government rest?

Mr. Ewing: The Government rests, your [260] Honor.

MILTON L. LEE,

recalled as a witness on behalf of the plaintiffs in rebuttal, resumed the stand and testified further as follows:

Direct Examination

By Mr. Lyman:

Q. Will you give your full name again, Mr. Lee? A. Milton L. Lee.

Q. Mr. Lee, you recall the testimony of Mr. Aronson yesterday, do you recall his testimony?

A. Yes.

Q. Do you recall specifically he was asked whether or not he ever refused or rejected a job, do you recall that question being put to him?

A. Yes, I do.

Q. And do you recall his answer, that he said he hadn't, to his knowledge?

A. That is as I remember it.

(Testimony of Milton L. Lee.)

Q. Now, do you have any recollection of any different situation?

A. Yes, I do. I remember talking to George on several occasions at the time we were getting into the siding business, trying to induce him to take on combination [261] jobs where he would be putting on a little siding, maybe, and windows, too. At that time he specifically said that he would not be interested in putting on any siding, regardless.

Q. And yet he continued with the company?

A. Yes, he continued to install windows.

Q. Now, do you have any recollection of Mr. Aronson saying that when he was given an order by someone to do a rush job as a preference, why, he always did it; do you remember his testimony to that effect? A. Yes.

Q. Now, do you have any specific recollection of any different situation occurring with reference to rush jobs? In other words, did you ask him at any time concerning a rush job?

A. Yes, I have had occasion to call George while he had work orders out and asked him to do a job that we considered to be quite important to us, and having been turned down.

Q. Well, what would he say, what reason would he give?

A. Well, George is a conscientious fellow, George would usually say, "No, I am tied up, I have got these other people I have committed myself to them, so I can't do it."

Q. And what would you do then? [262]

(Testimony of Milton L. Lee.)

A. We would get somebody else.

Q. Now, do you recall yesterday counsel was questioning Mr. Aronson, I believe he asked him questions to the effect if he ever had anyone else work for him, do you remember that question?

A. Yes, I do.

Q. And do you recall his answer was that he did not have anybody else work for him? A. Yes.

Q. Now, do you know of any situation that is contrary to that?

A. Yes, George has told me that he took out his brother.

Q. And do you know whether he ever told anybody else that he took out his brother?

A. Well, I read the same thing in his deposition.

Q. And that is on file in this court?

A. That is right.

Q. And that deposition was taken by the Government? A. Correct.

The Court: It is not offered, though.

Mr. Lyman: Well, for what it is worth, then, your Honor, I don't want to offer the whole deposition, I just don't think anything that loads the record is necessary.

Q. Now, do you recall that counsel was questioning Mr. Aronson about a situation where two men are put [263] together to do a large job, do you recall that? A. Yes.

Q. Now, what happens there, how do these two men get together?

(Testimony of Milton L. Lee.)

A. Well, the process is very simple, when you have a job that you realize the conditions are such that two men can work efficiently more than one.

Q. What kind of a job would that be?

A. That would usually be a large job, it would be a job requiring staging or extra handling of the material on it, long ladders.

Q. All right, go ahead.

A. Two or three-story jobs, you usually get two fellows you know are competent and ask them if they will work together.

Q. When you ask them, will they work together, what happens there?

A. Sometimes they will say yes or no, sometimes they will say, "I don't like to work with that fellow."

Q. All right, what happens then?

A. All right, so you finally get somebody else.

Q. Now, you finally get two that are amenable to each other, then what happens?

A. Well, having found two fellows that would do the job together, why they decide how they want to split up the [264] proceeds of the job, and they take it out and do it.

Q. Does the company interfere in any way in how they want to decide to split up the proceeds?

A. None whatsoever.

Q. I think there was some mention there about taking one of those men off the big job and sending him elsewhere, do you recall that testimony?

A. Yes, I do.

(Testimony of Milton L. Lee.)

Q. Now, how often, in your connection with this company, did that happen?

A. I never heard of it happening.

Q. What would happen to the big job if only one man were left?

A. Well, that is just the point, you would almost have to discontinue working on the job until you could get them back together.

Q. Now, do you remember the testimony of Mr. Aronson about taking a new man out, yes, a new man, to show him some work, do you recall that testimony? A. Yes.

Q. What was the situation with respect to that?

A. In the case of new men, usually, if they haven't had experience, you usually find a man that is doing that type of work and ask him if he will take them out and show them what the ropes [265] are.

Q. Now, do all your applicators take these men out, or how does that work?

A. No, they don't, some of them will have nothing to do with new men; others are very generous about it, they say, "I don't mind him watching me for a day or two," and so they take them out.

Q. Is there any pay arrangement for these new people?

A. Well, that is varied from time to time. The company, of course, assumes no obligation to pay them, but if a man going out on a job can use an extra man, sometimes they can, why, they take him along as a helper; otherwise, they just say, "He

(Testimony of Milton L. Lee.)

can go along, but I won't pay them," so they go along as an observer.

Q. Did you ever get any applicator to take a sign and put it on his truck or let you paint it on his truck?

A. No, that has never happened, to my knowledge.

Q. Did you ask them?

A. Yes, we have asked a lot of them.

Mr. Lyman: That is all, your Honor.

Cross-Examination

By Mr. Ewing:

Q. Did you state, Mr. Lee, that you have sent Mr. Aronson out on jobs and you have called him to move him to a different job and he [266] didn't go? A. I didn't state that.

Q. What did you say? Did you say you have called Mr. Aronson on occasions to do a job somewhere else and he didn't go?

A. Yes, I have asked Mr. Aronson when he had work orders out if he would start another job that was particularly pressing at the time.

Q. Do you know whether the job he was on at that time was a rush job or not?

A. Well, as a matter of fact, we usually consider any job that is in process being pretty much priority to finish, I don't remember specifically whether the job he was on was rush, but it could be.

Q. In other words, the job he was on could

(Testimony of Milton L. Lee.)

have been rush just like the one you wanted to send him to? A. That is right.

Q. That would be a pretty good reason for not leaving, then, wouldn't it? A. Of course.

Q. Now, you stated that Mr. Aronson had somebody work for him for a time, which you didn't know about, but later found out about?

A. His brother?

Q. Was it your testimony that you later found out that Mr. Aronson had somebody working for him that you didn't [267] know about?

A. No.

Q. Well, what did you say in reference to that?

A. I was asked if I knew George Aronson had a helper at one time and I said "yes."

Q. And who was that? A. His brother.

Q. Do you have any control over helpers?

A. No.

Q. Do you hire helpers?

A. No, I don't remember that we ever have.

Q. Do you discharge helpers at all?

A. I don't remember ever doing it.

Q. Is it your policy to want to know when an installer has a man working for him? A. No.

Q. I believe that Mr. Lyman asked you if you knew of any instance within your own knowledge where you knew a worker had been taken off a job before it was finished and moved to some other job, and you stated that you never knew that happened.

A. The specific question was with regard to a

(Testimony of Milton L. Lee.)

large job, where two men were working on it at the same time, I don't remember that happening, no.

Q. You don't remember an installer, those installers, being [268] split up, is that what you mean? A. That is right.

Q. Do you know of your own knowledge whether one installer working on a job has ever been moved off that job to another job before it was finished?

A. I know of lots of cases where installers have been asked to go from one job to another before it was finished, yes.

Mr. Ewing: That is all I have.

Redirect Examination

By Mr. Lyman:

Q. With reference to the last question, Mr. Lee, does the particular installer who is asked this, does he have some discretion or say in the matter?

A. Yes, he does.

My. Lyman: That is all. That is all, your Honor, the plaintiffs rest. [269]

* * *

ORAL OPINION OF THE COURT

The Court: Gentlemen, I have reviewed these cases, while I haven't read them necessarily in detail, I am not nearly as familiar with them as Mr. Lyman is. I feel that I am as able now as I am at any time to make a determination in this case. I recognize the fact that I am not bound by any State court determination as to what is an employee. I am not to be influenced by the actions of the plain-

tiff before 1958 because the matter is to be viewed as though we were making an initial determination on the real estate when this matter comes up, and this is, is there control, are the elements and all the other elements in the definition given by the statute such as to require a determination that this is an employer-employee relationship, as defined by the Act, because the Act says:

“Section 3121(d) Employee. For the purposes of this chapter, the term ‘employee’ means:

Subdivision 2. Any individual who, under the usual common law rules applicable in determining the employer or employee relationship, has the status of an employee.”

and the same definition in Section 3306.

So, we turn to the cases to find out what the rule is before we apply it to the particular facts in our particular case. Now, the amendments that I have read, as I understand the statutes, were adopted in 1948, so, I don’t know that the cases before 1948 have any particular bearing except as they may shed some light upon what the common rule might be with reference to what is an employer-employee relationship.

In U. S. v. Silk, decided in 1947, at 331 U. S. 704, there were two classes of employees and the two cases were consolidated. Unloaders of coal were paid by the piece work, they were paid by the ton, whereas, the unloaders of trucks were not employees and, therefore, not covered.

Bartels v. Birmingham was a case involving proprietors of music halls and name band leaders, and it was held in that case the musicians were employees of the leaders and not proprietors. That was decided in 332 U. S., 126.

Now, in 1945 in 148 Fed. (2d), 649, Grace v. Magruder, coal hustlers were determined to be employees and it is said that the control wasn't all entirely essential.

Now, in 1943 in Radio City Music Hall v. United States - 135 Fed. (2d), 715, there was a degree of control of details and it was held in that case that the entertainers were employees.

And those, I think are most of the cases cited which were cited prior to the amendment.

I can't find any particular comfort in a lot of these cases, except as they may shed some light on the particular facts in our case, or as they may have facts that are similar. Now, there a number of cases, and I note and will note, in passing, the number of cases that Mr. Lyman has appeared in: Consolidated Housecraft v. United States in the Eastern District of New York - 170 Fed. Supp., 842, was a case in which Mr. Lyman presents the matter for the employer, or for the dealers, the plaintiff. It was held that where the salesmen got orders the corporation submitted to applicators the orders, which they could either accept or reject. If they were accepted, they had almost complete discretion and they fixed their own schedule and hired their helpers. Supervision was only superficial. They held they were independent contractors.

Mervis v. United States, decided last year in 187 Fed. Supp., 248, by J. Skelly Wright, the Judge in Louisiana, held almost the same thing, as did Silver v. United States in 1944 - 131 Fed. Supp., 209. That was a case in which Judge Brennan, to whom reference will be made later, decided the case.

Now, in United States v. Thorson, decided in 1960, in which Mr. Lyman participated - 282 Fed. (2d), 157, it held that there was no exercise of direct control over the applicators and, therefore, they were held to be independent contractors.

Now, I have notes on and I could refer to a number of other cases but, generally, there are a number of these particular type, this particular type of a case, that is, where a salesman would go out and get orders, where the applicators would go out, take a work order, and go out and do the work, and a number of them have held, and I think the majority of them, have held, that where there is no supervision, where there is no control, where there is nothing that is done to direct the work, the applicators are independent contractors.

Now, I refer to Edwards v. United States in the Court of Claims, in which Mr. Lyman participated - 168 Fed. Supp., 955, decided in 1958. That is the Spokane case to which reference is made, and Mr. Edwards was operating with Inland Roofing. In that case the Court, I think it was Judge Jones, Chief Judge Jones, said:

“There was no supervision. The plaintiff did not know anything about the work.”

He never took a man off the job, and that there was a complete lack of supervision, although the contractors could, that is, the applicators could, take jobs or refuse them, as they chose, and, apparently, the Inland Roofing Company withheld them, as they chose.

American Homes of N. E., Inc. v. United States, 1959 in Massachusetts - 173 Fed. Supp., 857, the applicators were not employees. And Jagolinzer v. United States - 150 Fed. Supp., 489, they were held not employees, as the right to control was that only of the result, and not of the means and method, both of which cases Mr. Lyman participated in.

In 1959 Fleeman v. United States - 175 Fed. Supp., 386, in Ohio, the case holds that there was no right to control of the means, only the right to control the result. The applicators were held to be independent contractors.

Now, we have a situation, also, in these cases that were referred to by counsel for the Government in his argument, Ringling Brothers is an old one, 1951 - 189 Fed. (2d), 865, and they were held to be employees, and I think probably, counsel, Mr. Lyman's description of the relationship between the Ringling Brothers' performers and the company is a different situation than we have here.

I come back to the problem, and I feel that Judge Brennan, in the Ben v. United States case - 139 Fed. Supp., 883, and Judge Aldritch, in Security Roofing & Construction Company v. United States in 163 Fed. Supp., 794, has given us the measure, because in the particular cases each case has to stand upon

its own bottom. We have to have a situation where all of the circumstances are taken into consideration and not any particular one, and Mr. Lyman, in his argument, mentions the fact that these things show that these parties were independent contractors. There are just as many things, it seems to me, that show that they were classified as employees and since the burden of proof is on the plaintiff in a case of this kind, I feel that it is up to me to make the determination from the facts, whether they control or not, I mean, and determine whether they control or not.

Now, I will not detail by any means the notes that I have, but there are certain things that seemed to me to be present in this case that were not in some of the other cases, not particularly in the Inland Roofing case, and I will make reference now to Mr. Lee's deposition. What kind of control was exercised?

"Q. On these jobs that you have gone out to look at, have you ever made any suggestions?"

"A. Surely."

"Q. And you expected them to be followed?"

"A. Well, if I made a suggestion, I certainly would."

"Q. Have you ever given any directions?"

"A. To an applicator?"

"Q. Yes."

"A. If the occasion arose, I would, yes."

"Q. And you expected him to follow those directions that you gave?"

objection and, again, stating the question:

“Q. (By Mr. Ewing): You stated that there have been times when you have given directions to an applicator, is that right?

“A. No, I didn’t say that. You asked me if I would give them directions, and I said I would and if I gave them, I would expect them to be followed, yes. My day-to-day knowledge of these applications is not such that I would be in that position.”

bear in mind that one of the problems is not what kind of supervision was exercised, but whether the party has the right to exercise the supervision, whether it was exercised or not. Again, on page 19, line 18:

“Q. Did you have the power to give directions, Mr. Lee?

“A. Yes, in making a deal with an applicator to apply a job, at least, I would assume that you would have the power of instructing him as to the way it should be done. Unwritten law in the business, you might say.

“Q. Did you, in fact, instruct installers as to how the job should be done?

“A. Oh, on occasion, yes.”

Again, on pages 22 and 23:

“Q. Would there be times when a home owner would call into your office during the performance of the work and say he was dissatisfied with the work?

“A. Yes.

“Q. What would be done, then?

“A. Well, on occasion the job would be taken

away from the man that was doing it, and on other occasions the home owner would probably be educated as to why he was doing what he was, and in some cases the home owner would complain about the work being done when maybe it was a matter of what he had to work with. I am speaking of the windows and the doors that he was installing or the opening that he was putting them on. I say, there is no general rule as to how you take care of a complaint."

And on page 24:

"Q. And if that representative from your office felt that the work was not being done in a satisfactory manner, then that person who went out from your office would excuse that applicator from that job?"

"A. Yes, that is about the way it would work, yes."

Now, it seems to me as though there is a decided ability and recognized ability to control in this particular case and, therefore, it seems to me it doesn't come within the Edwards case or a number of the other cases, but it actually comes within the Ben case, the Williams case, the Consolidated Security Roofing case, and I call also attention to the testimony of Aronson, while I realize that that was not at the instance of the plaintiff, it gives a direct conflict to the testimony in reference to some of the matters that are determined or testified to by the plaintiff's witnesses, and I feel that under the circumstances there has not been, the burden of proof

has not been sustained and, accordingly, judgment will be for the defendant.

* * *

[Endorsed]: Filed August 21, 1961.

[Title of District Court and Cause.]

Civil Nos. 1882 and 1883

CERTIFICATE OF CLERK

United States of America,
Eastern District of Washington—ss.

I, Dorothy E. Moulton, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the original documents filed in the above-entitled cause to wit:

Date Filed Title of Document

11/10/59—Complaint for Refund of Employment Taxes Erroneously Paid and Collected (Civil No. 1882).

11/10/59—Complaint for Refund of Employment Taxes Erroneously Paid and Collected (Civil No. 1883).

1/ 7/60—Answer (Civil No. 1882).

1/ 7/60—Answer (Civil No. 1883).

12/16/60—Pretrial Order.

3/29/61—Deposition of Milton L. Lee (enclosed herewith but not attached hereto).

5/19/61—Findings of Fact and Conclusions of Law.

| Date Filed | Title of Document |
|------------|--|
| 5/19/61 | Judgment. |
| 5/29/61 | Bill of Costs. |
| 7/17/61 | Notice of Appeal (Civil No. 1882). |
| 7/17/61 | Notice of Appeal (Civil No. 1883). |
| 7/18/61 | Bond for Costs on Appeal (Civil No. 1882). |
| 7/18/61 | Bond for Costs on Appeal (Civil No. 1883). |
| 7/20/61 | Consent to Substitution of Attorney (Civil No. 1882). |
| 7/20/61 | Consent to Substitution of Attorney (Civil No. 1883). |
| 7/28/61 | Stipulation. |
| 8/10/61 | Statement of Points. |
| 8/10/61 | Designation of Record. |
| 8/16/61 | Designation of Record. |
| 8/18/61 | Order Extending Time to Docket Record on Appeal. |
| 8/21/61 | Reporter's Transcript—Record of Proceedings at the Trial (enclosed herewith but not attached hereto). Plaintiffs' Exhibits P-E-1—P-E-8 (enclosed herewith but not attached hereto). |
| | Defendant's Exhibits D-E-9 and D-E-11 (enclosed herewith but not attached hereto). |

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of

Washington, in the United States Court of Appeals for the Ninth Circuit, as called for in Appellants' Designation of Record, and Appellees' Designation of Record, and

I further certify that Exhibit D-10 requested in the Appellants' Designation of Record has not been included in this record on appeal as it was not offered or admitted.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 9th day of October, A. D. 1961.

[Seal] /s/ DOROTHY E. MOULTON,
Clerk, United States District Court, Eastern Dis-
trict of Washington.

[Endorsed]: No. 17595. United States Court of Appeals for the Ninth Circuit. Alesco Storm Windows, Inc., Appellant, vs. United States of America, Appellee; Alesco Northwest, Inc., Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Eastern District of Washington, Northern Division.

Filed October 11, 1961.

Docketed: October 25, 1961.

FRANK H. SCHMID,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 17595

ALSCO STORM WINDOWS, INC., for Its Own
Account and as Transferee of the Assets of
Vent-Air Awnings, Inc.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

No. 17595

ALSCO NORTHWEST, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS

Appellants set forth the following points on which
they intend to rely on appeal:

1. The Court erred in concluding as a matter of
law that the applicators were employees under the
Federal Insurance Contributions Act, § 3121(d),
Internal Revenue Code, and the Federal Unemploy-
ment Tax Act, § 3306(i), Internal Revenue Code.

2. The Court erred in drawing illogical inferences
from undisputed facts, such inferences being

induced by an erroneous view of the applicable law.

3. The Court erred in making some findings of fact without evidentiary support in the record.

/s/ JOSEPH J. LYMAN,
Attorney for Appellants.

[Endorsed]: Filed October 20, 1961.

[Title of Court of Appeals and Cause.]

STIPULATION AS TO PRINTING OF THE RECORD

It is hereby stipulated and agreed, subject to the approval of the Court, that the parties may refer in their briefs and argument to any part of the certified record filed with the Court which has not been designated for printing, viz. Plaintiffs' Exhibits 1-8, inclusive, and Defendant's Exhibits 9 and 11.

/s/ JOSEPH J. LYMAN,
Counsel for Appellants.

/s/ LOUIS F. OBERDORFER,
Assistant Attorney General,
Counsel for Appellee.

Dated: October 17, 1961.

So Ordered: Oct. 19, 1961.

/s/ R. CHAMBERS,
Circuit Judge.

[Endorsed]: Filed October 20, 1961.

